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No. _____

In The

Supreme Court of the United States

October Term, 1994

BREAUX BROTHERS FARMS, INC., TECHE PLANTING, INC. and FRANCIS "PAT" ACCARDO,

Petitioners,

versus

TECHE SUGAR COMPANY and SOUTH COAST SUGARS, INC.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

a. Did the Fifth Circuit Court of Appeals, in its decision, correctly apply the appropriate standard for determination of sufficient market power in a tying case involving unique land?

b. Is the position taken by the Fifth Circuit in its decision inconsistent with prior rulings of this Court and with decisions taken by the Sixth Circuit in *Bell v. Cherokee Aviation Corporation*, 660 F.2d 1123 (6th Cir. 1981) and *Ware v. Trailer Mart, Inc.*, 623 F.2d 1150 (6th Cir. 1980), the Eighth Circuit in *Rosebrough Monument Company v. Memorial Parks Cemetery*, 666 F.2d 1130 (8th Cir. 1981) the Ninth Circuit in *Moore v. James H. Mathews & Co.*, 550 F.2d 1207 (9th Cir. 1977), and the Eleventh Circuit in *Tic-X-Press, Inc. v. Omni Promotions Co. of Georgia*, 815 F.2d 1407 (11th Cir. 1987).

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PETITION FOR WRIT OF CERTIORARI

Breaux Brothers Farms, Inc., Teche Planting, Inc., and Francis "Pat" Accardo[1] respectfully petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

[1] Pursuant to Sup. Ct. Rule 29.1, petitioners Breaux Brothers Farms, Inc., Teche Planting, Inc. and Francis "Pat" Accardo certify that they have no parent companies or subsidiary corporations.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, App. 1-14) is reported at 21 F.3d 83 (5th Cir. 1994). The opinion of the district court (App., *infra*, App. 15-68) is reported at 792 F. Supp. 1436 (W.D. La. 1992).

JURISDICTION

This Court's jurisdiction is based upon 28 U.S.C. § 1254(1). The judgment of the district court to be reviewed is dated August 17, 1992 (App., *infra*, App. 69-71). The order denying rehearing is dated June 10, 1994 (App., *infra*, App. 72–75).

STATUTORY PROVISION INVOLVED

15 U.S.C. § 1. Sherman Anti-Trust Act.

STATEMENT OF THE CASE

Petitioners, Breaux Brothers Farms, Inc ("Breaux"), Teche Planting, Inc. ("Teche Planting") and Francis "Pat" Accardo ("Accardo"), farmers in St. Mary Parish, Louisiana, sued sugar mill owners, Teche Sugar Company and South Coast Sugars, Inc. ("Teche Sugar") in November 1990 for violation of Section 1 of the Sherman Act. They alleged the mill owners had illegally tied the lease of land to milling services, and sought injunctive relief and damages. The United States District Court for the Western District of Louisiana, Judge Rebecca F. Doherty, after trial

on the merits, agreed that the Sherman Act had been violated.

Analyzing the facts of the case under both the per se[2] and rule of reason[3] tests, the district court granted injunctive relief and awarded petitioners damages and attorney's fees. The court of appeals reversed and ruled that although the farmers had been harmed by the actions of defendant mill owners, the mill owners had insufficient market power to trigger a per se violation.

A. Brief Statement of Facts

Herbert Breaux (the owner of Breaux), Pat Accardo, and Donald and Larry Chauvin (the owners of Teche Planting) have farmed sugar cane in St. Mary Parish, Louisiana for virtually their entire lives. These farmers, like every sugar cane farmer who testified, do not own most of the land they farm. They have historically leased their farms.[4]

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[2] The district court found the tying product (land) to be "large contiguous tracts of sugar cane land within practical transport distance of operating mills . . . " (App., *infra*, App. 34) "which became available only cyclically . . . " (App., *infra*, App. 41). This unique quality of the tying product together with other factors cited by the court led it to conclude that market power sufficient to support a per se violation had been demonstrated.

[3] The district court found that an entire market (for milling services) and the competition within that market vis-a-vis the farmers "has been destroyed."

[4] Before the system of tying became prevalent in the market, farmers leased directly from landowners. The landowners receive a percentage of the gross receipts from the crop, once it

Breaux and Teche Planting began farming portions of the land at issue under a lease extending from 1980 to 1985.[5] Shortly before 1985, Prudential Insurance Company ("Prudential") purchased the land, and in 1985 petitioners leased the same land from Prudential.[6] All three leases with Prudential expired on December 31, 1989.

The defendant companies ("Teche Sugar")[7] were owners of two sugar cane mills – the Oaklawn Mill ("Oaklawn") in Franklin, Louisiana and the Raceland Mill ("Raceland") in Raceland, Louisiana.

Teche Sugar began its practice of tying the lease of land to milling service in 1985 on land it owned, and on land it controlled through master leases. Teche Sugar obtained one such master lease on August 31, 1989 from Prudential. This master lease included the property farmed historically by the petitioner farmers. In early 1990, Teche Sugar then proposed a new sublease to each

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is milled, as their rental. Teche Sugar, through the system of master leasing, critically changed this historical relationship.

[5] Breaux leased approximately 500 acres; Teche Planting leased approximately 723 acres; and Accardo leased approximately 1,760 acres.

[6] Identical agricultural leases with Prudential were signed by Accardo and Teche Planting.

[7] Defendants are all affiliated or subsidiary companies. Teche Sugar Company, Inc. owned the Oaklawn Mill. South Coast Sugars, Inc. owned the Raceland Mill. Teche Sugar and South Coast are wholly owned by South Louisiana Sugars, Inc. Teche Sugar is also the master lessee. Caneland, Inc. is a wholly owned subsidiary of Teche Sugar. It also owned sugar cane land in which an illegal tie was forced upon farmers.

farmer.[8] Paragraph 4 of each proposed sublease provides in pertinent part:

> "4. *DELIVERY OF CANE – PAYMENT BY DESIGNATED MILL.*
>
> . . . *Sublessor shall have the right to designate the sugar mill or mills at which the sugar cane from the Premises is to be milled and ground, and shall advise Sublessee, in writing, of such designated mill or mills.* Until otherwise notified to the contrary, in accordance with this paragraph, *Sublessor hereby designated Raceland Sugar Mill in Raceland, Louisiana, as the designated mill.*" (Emphasis ours).

The land in question is situated very near the Oaklawn Mill in St. Mary Parish. Oaklawn Mill had historically been the farmers' mill of choice for various economic reasons. Teche Sugar elected to close Oaklawn after the 1989 grinding season, designating, in its proposed subleases, that the cane would be shipped to Raceland some 75 miles away. This placed an enormous economic burden on the farmers, but petitioners could do nothing about it if they wanted to maintain their leases and their livelihood. There was no farm land available for lease within the relevant market area.

There are 45,000 – 50,000 acres of cultivable sugar cane farm land in St. Mary Parish. Available land for sugar cane farming in St. Mary and Iberia Parishes is minimal, if not nonexistent, in any given year. The only

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[8] Identical subleases were proposed to all petitioners.

evidence of land available in 1990 was a tract of approximately 450 acres *tied to Sterling Mill. This land was not available without a tying arrangement.*[9]

At the time these subleases were proposed, the practice of tying land was growing rather than diminishing.[10] In addition, the lengthy duration of farm land leases, the fact that many are contractually renewed, and few, if any, are ever available on the open market, significantly reduces the amount of land available for lease in any given year. These factors *and* Teche Sugar's percentage of control of suitable land in St. Mary Parish made the situation ripe for economic coercion.

The selection of a mill is critical to a farmer's survival. It is the *only* source of income to a sugar cane farmer. The farmers who testified stated they considered numerous factors in choosing a mill. The tying provision deprived the farmers of the ability to select a mill based upon the traditional price and quality criteria.

Petitioners, in writing and in oral communication, tried unsuccessfully to negotiate the proposed tying provision out of the lease. Accardo and Teche Planting refused to sign the proposed subleases and send their cane to Raceland citing their fear they could not farm

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[9] The availability of this land was made known to only a few farmers by Fred Clark of the Sterling Mill who quickly found a farmer to take over the land with a freeze-damaged crop.

[10] In 1989, Oaklawn milled 270,000 tons of cane, of which 220,000 tons of cane were from tied sources. Approximately 55% of the cane milled by Sterling in 1989 came from tied sources.

profitably. They looked for other available cane land in St. Mary and Iberia Parishes *but found none in 1990.*[11]

Breaux, because of bank loans and other indebtedness, could not afford to lose its land. Breaux was a small farmer and this land constituted the vast majority of its operation. As Herbert Breaux stated at trial:

> Q. Nevertheless, even though you felt it was outrageous, you went ahead and executed this lease, didn't you?
>
> A. Yes, I did.
>
> Q. Why?
>
> A. I had a financial gun to my head.
>
> * * *
>
> A. I owed people. I owed notes on my tractors, my house, truck, etc. Got a family to feed. And if I wouldn't have signed this lease, I would lose the land; and that's the majority of my living.

For months prior to signing the lease, Breaux searched in St. Mary and Iberia Parishes for comparable sugar cane acreage. On May 2, 1990, Breaux executed a sublease with Teche Sugar which contained paragraph 4 cited above. To the best of his knowledge, no substitute land was available. Coercion was therefore inevitable. Teche Sugar took full advantage of the situation.

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[11] Accardo found much smaller and poorer land over a year later. Teche Planting, through trial, had not found any replacement land for the 35% of its total acreage lost.

In late 1991, Teche Sugar sold Raceland to Savannah Foods and Industries, Inc., an unrelated third party. *Teche Sugar, however, did not release Breaux from the tying provision.* Instead, Breaux was forced to deliver its cane to the Sterling Mill in Franklin, Louisiana. Teche Sugar's motivation in naming Sterling as the designated mill was a tolling agreement entered into with Sterling in August of 1990, a few months after the Breaux lease was signed. Under such agreement, Teche Sugar agreed to pay Sterling $9.00 per ton of cane ground by Sterling. Teche Sugar then retained the remaining proceeds from the normal mill share of cane which equated to a profit for Teche Sugar of between $6.00 and $9.00 per ton. The district court found this practice repugnant and stated:

> "Therefore, the tying arrangement as it exists today, has no legitimate business purpose other than to protect defendants from the effect of their own business decisions." (App., *infra*, App. 39)

At trial, the most compelling testimony came from Fred Clark of the Sterling Mill and Bert Beyt of the St. Mary Co-op,[12] each of whom suggested that the elimination of the tying practice through master leases would likely result in the most efficient mill grinding the most sugar cane. Therefore, competition would be restored. The disastrous effect of the tie on the farmers, and its distortion of the market for milling services was lost on the Fifth Circuit.

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[12] The two remaining mills in St. Mary Parish. They were not involved in the litigation and their testimony was highly credible.

B. Course of Proceedings and Disposition of the Court Below

On November 20, 1990, Breaux filed suit[13] bearing No. CV-90-2536, United States District Court for the Western District of Louisiana. On that same date, Teche Planting and Accardo filed suit bearing No. CV-90-2537 in the same court. Both complaints allege violations of the Sherman Anti-Trust Act, 15 U.S.C. § 1, with respect to a tying arrangement forced upon the farmers by Teche Sugar in proposed sugar cane subleases. Breaux testified he had an "economic gun to his head" and was forced to sign the subleases.[14] Breaux therefore sought injunctive relief to eliminate the tie and, if appropriate, damages arising therefrom.

Teche Planting and Accardo lost their leases because of the tie. Accardo went completely out of business and Teche Planting lost 35% of its land. They filed a separate action against the same defendants.[15] By order of the

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[13] Breaux's suit for preliminary injunction was partially settled when Teche Sugar agreed to hold the tying provision in abeyance for the 1991 grinding season pending trial on the merits.

[14] Breaux's economic gun was the fact that his farming operation was highly leveraged, and without the farm he had no way to pay back his various loans and earn a living.

[15] Teche Planting and Accardo also sued for damages and funds spent for preservation and upkeep of Teche Sugar's lands during the period the proposed subleases were being negotiated.

district court, these two cases were consolidated for purposes of trial. Trial began on February 18, 1992 and was concluded on February 26, 1992. After taking the case under advisement, the district court issued its memorandum opinion on May 13, 1992, in *Breaux Brothers Farms, Inc. v. Teche Sugar Company*, 792 F. Supp. 1436 (W.D. La. 1992). The district court held that 1) Teche Sugar's actions had violated the Sherman Anti-Trust Act and the tying provision was illegal; 2) Breaux was entitled to injunctive relief prohibiting enforcement of the tying provision, and an award of damages; and, 3) while Accardo and Teche Planting had proven antitrust injury and damage, they failed to prove the amount of damages suffered.[16] Final judgment was entered on August 19, 1992.

Teche Sugar appealed the antitrust portion of the district court's decision as to the finding of an illegal tie and damages.[17] The court of appeals held that, "Even under the narrowest of reasonable definitions, Teche Sugar lacked the requisite market power to trigger a per se violation." *Breaux Brothers Farms, Inc. et al. v. Teche Sugar Company., et al.*, 21 F.3d 83 (5th Cir. 1994). As support, it cited cases involving neither land nor other products which were unique, holding that a 30% market

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[16] Teche Planting and Accardo were also awarded a portion of their expenses in preserving Teche Sugar's land.

[17] On cross appeal, Accardo and Teche Planting argued they proved their antitrust damages and also sought additional expenses, which were not awarded by the district court.

share is a "rough benchmark for minimum market power necessary." It distinguished the cases in the Sixth, Eighth, Ninth and Eleventh Circuits relied upon by the petitioners herein by finding that the defendants in those cases had requisite market power.

The Fifth Circuit's analysis is in error. It is impossible to reconcile the Fifth Circuit's position with that taken by this court in *Northern Pacific Railroad Company v. United States*, 356 U.S. 1, 6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958), *Standard Oil of California v. United States*, 337 U.S. 293, 69 S. Ct. 1051, 93 L. Ed. 2d 1571 (1949), and *International Salt Co. v. United States*, 332 U.S. 392, 68 S. Ct. 12, 92 L. Ed. 2d 545 (1947); and the position taken by the Sixth Circuit in *Bell v. Cherokee Aviation Corporation*, 660 F.2d 1123 (6th Cir. 1981) or *Ware v. Trailer Mart, Inc.*, 623 F.2d 1150 (6th Cir. 1980), the Eighth Circuit in *Rosebrough Monument Company v. Memorial Park Cemetery*, 666 F.2d 1130 (8th Cir. 1981) the Ninth Circuit in *Moore v. James H. Mathews & Co.*, 550 F.2d 1207, (9th Cir. 1977), or the Eleventh Circuit in *Tic-X-Press, Inc. v. Omni Productions Co. of Georgia*, 815 F.2d 1407 (11th Cir. 1987).

Finally, showing a complete lack of understanding of the economic model presented by the case, the Fifth Circuit speculated that the system of tying may actually help competition in the market for the tied services. The evidence at trial was directly contrary to this statement. The trial court found that competition had been severely impaired.

REASONS FOR GRANTING THE PETITION

This Court has developed a different criteria for establishing market power sufficient to find a per se violation in a tying case where the tying product possesses some unique quality, imparts a competitive or strategic advantage, or has limited availability due to market conditions (cases cited above). The reasoning in these cases has led many district courts and circuit courts to hold that less market power is necessary in cases involving land as the tying product if that land is unique, desirable, or limited in availability. The Fifth Circuit, in this case, deviates from that reasoning and is in direct conflict with the jurisprudence on this issue.

Since 1958, no case involving this issue has reached this Court. This case offers the Court an opportunity to provide guidance to persons, like petitioners and respondents, who must rely in conducting their affairs on this Court's definition of an appropriate action under the Sherman Act. Failure to address the issues in this case may well have an adverse impact on the viability of private actions under the Act. Moreover, the decision below is erroneous, fails to give due weight to the factual findings of the trial court, and the issue it addresses is important to the entire agricultural community and to the proper administration of antitrust law.

I. The Court of Appeals' Decision is Erroneous.

This case took nearly two years to prepare and was the subject of six full days of trial testimony and documentary evidence presented to Judge Rebecca F. Doherty, United States District Court for the Western District of

Louisiana. Petitioners herein, employees of Teche Sugar, experts offered by both parties, numerous farmers, and mill managers all testified as to the facts in this unique case. The appellate court's review of the case was necessarily limited by the nature of the process.

Federal Rule of Civil Procedure 52(a), requires that the reviewing court give great weight to the findings of the trial court, and not set aside such findings unless clearly erroneous.

This rule has been applied in numerous cases.

Justice O'Conner, in her concurrence in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984), discussing the trial court's finding on market power, noted:

> " . . . [A]ppellate courts should normally defer to the district court's finding on such fact bound questions." (at p. 1574) (Also citing *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855-858, 102 S. Ct. 2182, 2188-2190, 72 L. Ed. 2d 606(1982).

The district court, in the case at bar, held that the tying arrangement forced upon petitioners by Teche Sugar was a per se violation of the Sherman Act. This Court has established that in order to have a per se violation, two separate products must be involved, a tie must exist, the party perpetrating the tie must possess sufficient economic power in the tying product to coerce acceptance of the tied product, and there must be an involvement of a not insubstantial amount of interstate commerce. *Northern Pacific, supra; Fortner Enterprises, Inc. v. U.S. Steel*, 394 U.S. 495, 89 S. Ct. 1252, 22 L. Ed. 2d 495

(1969). All of the above elements are clearly present in the facts adduced at trial. The issue of "economic power" held by Teche Sugar in the tying market is the only issue in dispute.

Economic power does not have to be created by a monopoly situation (*Standard Oil, supra*), if the tying product is unique, such as a patent (*International Salt, supra*); or copyright (*United States v. Paramount Pictures*, 334 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260 (1948)); or land that imparted some strategic advantage (*Northern Pacific, supra*). Land can easily impart a competitive or strategic advantage. It did in this case. This Court has not addressed a land tying case since *Northern Pacific, supra*. The Fifth Circuit's position is inconsistent with these cases and its position is also in conflict with the other circuit court decisions on this issue.

The Fifth Circuit misapplied the test to determine sufficient economic power as outlined by this Court in *U.S. Steel Corporation v. Fortner Enterprises*, 429 U.S. 610, 97 S. Ct. 861, 51 L. Ed. 2d 80 (1977) (*Fortner II*). *Fortner II* requires the court to look at whether the seller has the power within the market for the tying product to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market. However, the Fifth Circuit goes far beyond *Fortner II*. The logical result of the Fifth Circuit's decision here is that if the economic power of the owner of unique land (seller) is created by external circumstances such as zoning laws, lack of other land as a substitute, or market conditions, there can be no recovery where the harm to the petitioners could have been inflicted by any owner of

similar land. On this point, the Fifth Circuit departs dramatically from the cases in the other circuits.

Teche Sugar possessed a competitive advantage over its competitors because it had the only property suitable for sugar cane farming which was available in 1990. It also was in the unique position of controlling land the petitioners had worked for years and had improved to the point where it was exceptional farm land for sugar cane, familiar to the petitioners, and highly desirable to other farmers. The requirement of sending the sugar cane to Raceland was a "burdensome term" that was unacceptable. But for the "financial gun" to Mr. Breaux's head, he would not have accepted the tie.

The court of appeal focused on the market share held by Teche Sugar and stated in its opinion that the range of market share from 9.4% to 17.5% falls far short of the percentage this Court found insufficient in the case of *Jefferson Parish, supra*. Petitioners allege here, as they did to the Fifth Circuit, that gauging the market power for the ability to coerce simply on market share in the tying product does not alone reveal the ability of Teche Sugar to coerce farmers into accepting the tie. The evidence was uncontested at trial that tying was becoming more prevalent, with over 50% of the land in the relevant areas under a tie. Moreover, there was no substitute land in the relevant areas, regardless of Teche Sugar's market share. Finally, Teche Sugar had the only available land, giving it a unique position. Accordingly, a strong coercive element was clearly present.

II. The Fifth Circuit's Opinion is Inconsistent with Prior Rulings of this Court and Conflicts with Other Circuits Which have Addressed the Issue Presented.

This Court, in *Standard Oil, supra,* held that a controlled 6.7% of the retail gasoline market permitted an inference of substantial economic power. A 10% share of the market was held to be sufficient in *Cornwell Quality Tools v. CTS Company,* 446 F.2d 825, 831 (9th Cir. 1971). The market in the *Rosebrough* case was for 22% of the burials, certainly below the *Jefferson Parish* standard articulated and relied upon by the Fifth Circuit in the subject case.

Despite the reliance by the Fifth Circuit on *Fortner II* in analyzing the facts of the case at bar, other circuits have refused to extend *Fortner II* to situations where a seller has taken advantage of a unique situation in the market to coerce a buyer into acquiring something he might not otherwise accept. For example, in *Moore, supra,* the Ninth Circuit, after discussing *Fortner II,* relied instead on *Northern Pacific, supra,* for the proposition that "market power in the tying product market may also be shown by product uniqueness or desirability." In doing so the Court vacated the district court's judgment on the tie-in claims for failure to apply the appropriate legal standards to the facts of the case, stating:

> "This case is more analogous to the finding of uniqueness and sufficient economic power in *Northern Pacific* than to the lack thereof in *Fortner II* because the tie-ins here cannot be explained as a form of price competition in the tied product market." *Id.* at 1215.

In *Moore, supra,* the sale of cemetery plots was conditioned on the buyer's use of the cemetery's installation and care service and the purchase of markers through the cemetery. Scarcity of other cemetery plots made the land in question unique. These facts are more analogous to Teche Sugar's conditioning the lease of the scarce farm land on the use of their mill services, which similarly "cannot be explained as a form of price competition in the tied market." Therefore, the Fifth Circuit misapplied the *Fortner II* standard to the case at bar. Its opinion cannot be reconciled with *Moore.*

The Sixth Circuit also takes a different view of *Fortner II.* In *Bell v. Cherokee, supra,* there was virtually no discussion of market share. Cherokee, as defendant, took the position that it lacked the market power to raise prices or impose burdensome terms and pointed out that there were other airports in the Knoxville Metropolitan area and other entities that had identical sublease authority. Hence, the issue of substitute property was presented squarely to the court. The court of appeals dispensed with Cherokee's argument quickly, citing *Standard Oil, supra*: i.e. "[t]ie-ins are illegal even absent monopoly power in the tying market." The Sixth Circuit stated that the land in question was strategically located. It imparted a competitive advantage because of the market for real estate. However, it imparted no greater strategic advantage than possessed by Teche Sugar in the present case by having the *only acreage available* in the geographic market. Cherokee argued a potential lessee could have gone to another private landowner who may have possessed the same economic power. Presumably, this defense would have been successful if urged before the Fifth Circuit.

However, the Sixth Circuit held that Cherokee took advantage of its economic power by imposing a tie-in. Teche Sugar has done the same thing in the present case.

The case of *Ware v. Trailer Mart, Inc., supra,* another Sixth Circuit case, is even closer to the present case. In that case, the plaintiff claimed that because of zoning ordinances and restrictions, there was a limited amount of mobile home rental space in the Cleveland, Ohio area. Of the 25 mobile home parks in metropolitan Cleveland, he was told that spaces were rented only to those who purchased a mobile home from the defendant and other trailer park lessors. Since the plaintiff had his own mobile home, he refused to be coerced into buying another. Instead, he rented an apartment and stored his mobile home in another county. The court of appeals reversed a summary judgment, remanding the matter to the district court for determination of the market power and in so doing endorsed the concept that the uniqueness of the product and the coercive element are the issues to be addressed, again without reference to market share. The market power in *Ware* was a result of the scarcity of available land because of a zoning ordinance. Other lessors in the same market could have asserted the same coercive influence. In spite of this fact, the Sixth Circuit still remanded the case for trial. In the present case, size, location, and limited availability of the land is clearly analogous to the zoning ordinances and limited availability of spaces in *Ware.*

The Eighth Circuit has taken a position consistent with the Sixth Circuit. In *Rosebrough,* the court stated that it is unnecessary for the plaintiff to prove by voluminous economic data that the person forcing the tie has a

strangle-hold on the tying market. A percentage of market share was discussed, the defendant had but 22% of the relevant burial market. The court instead looked at whether the characteristics of the tying product imparted a competitive advantage. The court went on to hold that in the case of cemetery plots, it was very difficult, *because of zoning restrictions* in the St. Louis area, for new cemeteries to be built. Therefore, the artificially restricted market established the scarcity of substitutes and therefore the uniqueness. This same principle should be applied to the "scarcity" of sugar cane land in St. Mary and Iberia Parishes. Teche Sugar Memorial Park Cemetery Association, took advantage of that market condition, as did the defendants in the *Ware* case.

The Fifth Circuit is also clearly at odds with the Eleventh Circuit on the question of the source of the seller's competitive advantage. In *Tic-X-Press, Inc. v. Omni Promotions Company of Georgia*, 815 F.2d 1407 (11th Cir. 1987), the court affirmed the district court's finding of an illegal tie, in requiring those who wished to lease the Omni Arena in Atlanta to also use their affiliated ticketing service. In so doing, the court found that the petitioner, a competing ticketing service, effectively demonstrated the sufficient market power of the arena/ticketer in the relevant market due to the uniqueness of the Omni Arena. Although there was ample evidence of several alternative event facilities in the Atlanta area, and these arenas could also attempt to tie ticket services to events, the court found the Omni Arena sufficiently unique for purposes of establishing the requisite market power. In 1990, the farm land in question was even more unique and certainly imparted a strategic advantage to Teche Sugar in negotiating the leases. The Omni Arena had the best game in

Atlanta. Teche Sugar had the *only* game in St. Mary and Iberia Parishes at the time these leases were proposed.

Petitioners assert, as did the plaintiff in the *Rosebrough* case, that the combination of the uniqueness of the land, the scarcity of substitute land, the overt willingness of Teche Sugar to take advantage of the economic situation, and the market share of Teche Sugar controlling thousands of acres of sugar cane land, collectively adds up to the inescapable conclusion that Teche Sugar had sufficient market power to meet the appropriate standard. It is impossible to reconcile any of the above cases with the Fifth Circuit opinion.

III. The Question Presented is Important.

The issue presented is important because its resolution will impact the entire sugar industry in Louisiana and may be a crucial factor in its survival. The decision will also impact the entire agricultural community generally by establishing a level playing field on which independent farmers who must deal with increasingly large corporate interests for their survival must operate. It can also be said that the principles at issue here extend far beyond the farming community.

In the following sections, we will discuss the impact of the challenged tying practice on the farmer, the mills, and the consumer.

A. Impact of the Tie on the Farmer

1. The economic cost to the farmer.

Determining the economic cost of milling services to the farmer requires consideration of several components of both expense and income: expense incurred in getting the cane to the mill, and payments to the farmer by the mill for the cane delivered.

The distance from the farm to the mill directly affects the cost of production. Both transportation costs and losses due to handling the cane go on the expense side of the ledger. On the income side of the ledger, hauling fees and crop proceeds are considered. The mill pays a fixed fee per ton of cane delivered to offset transportation and hauling costs. The other income item, crop proceeds, are paid based on a percentage split of the total sale price of the raw sugar produced by the mill. The percentage split does not vary widely from mill to mill, but the efficiency of the mill in extracting sugar from the cane and the timeliness of its payments can have a significant impact on the total the farmer receives.

In addition, the hauling fee is significant in the case at bar, because the petitioners had already made a huge capital investment to haul cane short distances with tractors and wagons. The proposed leases would require significant new and different equipment to transport the cane to the distant designated mill; and at the same time the hauling fee they could expect to receive in the usual and customary mill arrangement was eliminated.

In a comparative context then, the difference in cost of milling services can be expressed as the difference in

the farmer's net return on each ton of cane delivered to one mill, versus the net return on each ton delivered to another mill. The petitioners were able to demonstrate this difference at trial based on the results obtained by the petitioner Breaux, which hauled cane to both the distant designated mill in Raceland and the local Sterling Mill in 1990.

In a detailed analysis presented to and accepted by the trial court in this case, it was demonstrated that the difference in net income received by petitioner, Breaux, during the 1990 harvest from the Raceland Mill was $3.29 per ton of cane less than it received from the Sterling Mill in that same year. Therefore, the excess cost of milling service to Breaux for each ton of cane delivered to the tied mill was established, and served as the proper basis for the damages assessed by the trial court.

Obviously, Breaux was harmed by being forced to purchase milling services at a higher price from the tied mill, just as the other petitioners would have been harmed if they had accepted the tying arrangement.

It is important to note that the analysis referred to above did not include the cost of purchasing trans-loading equipment. (Breaux was provided with trans-loading equipment by agreement between the parties to this lawsuit in 1990.) The cost of such equipment would have added significantly to the cost of milling service to the farmers, by reducing the farmers' net return.

2. Other Costs to the Farmer.

This case is particularly significant because of the impact of this tying practice on the small independent producer, the person at the lowest economic rung of the industry ladder. From the outset of this case, the petitioners undertook a difficult and costly task – to put an end to a practice which did serious harm to the sugar industry and eroded the market power of farmers becoming increasingly dominated by powerful mill and property owners. Absent the ruling of the district court in this case, the farmers will be left to the whim and caprice of those who have sufficient resources to dominate this segment of sugar cane production.

Concern for the individual entrepreneur and the impact of antitrust practices has always been a strong basis of the legislation on this subject. The words of Senators who debated the adoption of the Sherman Act in 1890 are instructive of their intent.

> "This bill, as I would have it, has for its single object to invoke the aid of the courts of the United States . . . in dealing with combinations that affect injuriously the industrial liberty of its citizens . . . It is the right of every man to work, labor, and produce in any lawful vocation . . . This is industrial liberty and lies at the foundation of the equality of all rights and privileges . . . "

(21 Cong. Record 2457 (1890) Statement of Senator Sherman.)

> "These trusts and combinations are a great wrong to the people . . . They increase beyond reason the cost of the necessaries of life and

> business and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will . . . they are fast producing that condition in our people in which the great mass of them are the **SERVITORS** of those who have this aggregated wealth at their command." (Emphasis Ours)

(21 Cong. Record 1768 (1890) Statement of Senator George.)

The very same sentiments and principles which compelled the Congress to adopt the Sherman Act in 1890 exist in this case. History and experience have taught us that large corporate or cooperative farming operations cannot compete with small independent farmers.[18] The challenged practice makes the farmer nothing more than an employee (or servant) of the mill. It clearly serves our national economic interest to encourage and promote competition in the market in which these independent entrepreneurs operate.

The tying practice challenged in this case deprived the petitioners of a key element in their economic freedom, the right and ability to choose a mill to process their product. Under these leases, they no longer have the freedom to choose. The harm done by these agreements transcends economic considerations.

As Professor Peritz observed:

> "Modern antitrust doctrine should not abandon this tradition of special solicitude for industrial

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[18] See Fred Clark's testimony on the inefficiency of a large mill owned field operation as compared to small independent farmers.

> liberty, for the independent entrepreneur's freedom to compete. The alternative disserves not only entrepreneurs but also consumers, because the increasing concentration of ownership of the means of producing and distributing goods and services in the late twentieth century is deeply troubling, not only in economic terms of competition policy and property rights, but also in socio-political terms of traditional commitments to liberty and equality." (*A Geneology of Vertical Restraints Doctrine*, Rudolph J. Peritz (Professor of Law, N.Y. Law School) 40 Hastings Law Journal 511, at 576.)

Professor Peritz believed that economic freedom allows the opportunity to act independently in social and political matters and is crucial to the workings of democratic government.

B. Impact on the Mills

Competition among mills for the cane produced by farmers involves several components. In an open market these factors are interrelated. The greater the mill's efficiency in extracting sugar and the better price it receives for its product the more likely it is to attract a cane supply from the farmers.

When the cane supply is tied, the emphasis shifts. Now it is possible for the mill to increase its profits by simply charging more for its milling service (or paying the farmer less). Of course, it can be presumed that all mills wish to make more profit. A mill which operates very efficiently and also has a tied cane supply can make even greater profits. If this is the likely result of tying,

why did the Oaklawn Mill close in 1989? Teche Sugar started tying in 1986 and, by 1989, 81% of the cane milled by Oaklawn was from tied sources. The closure of the Oaklawn Mill in 1989 belies this theory and *more importantly*, it reduced the number of mills competing in the relevant market area from 6 to 5.

We suggest that Teche Sugar's practice was designed to extract extra profits from those involved in producing sugar cane, profits which were not reinvested in the mill to ensure its efficiency and continued survival. This was a major reason for the reluctance by farmers to patronize the mill. Farmers recognized the mill's ability to compete efficiently was being reduced and thus the mill's ability to provide milling services would be short lived.

C. Impact on the Consumer

It is very difficult to calculate or predict with any certainty what either the immediate or long term impact of the challenged tying practice may be on the ultimate consumer of sugar.

The domestic sugar cane industry is influenced by federal legislation, international agreements on trade, and both domestic and international competition. There are no direct subsidies of the sugar industry. The industry is supported by a federal loan program. However, the control of imports has maintained a stable price and prevented the sugar placed on loan from being the subject of forfeiture. Therefore the sugar industry has received no direct subsidy from tax dollars under the

current Farm Bill. Because of the manner in which the price of sugar on a national basis has been controlled, it has not varied widely over the last decade; and, it is doubtful that the tying arrangements in this case would have any direct or immediate effect on the price of sugar at the supermarket. However, the long range implications of such practices are clearly negative.

American sugar cane farmers are among the most efficient agricultural producers in the world. Most sugar cane industry experts maintain that the domestic industry can compete nationally and internationally in an open market with no government support provided there is full and free competition in the market place.

The North American Free Trade Agreement (NAFTA) will lead, in several years, to open competition with Mexico and other South American sugar producers. As the transition to international competition takes place, sugar farmers and mill operators will have to prove that they can compete in a truly open market. Many will have to further increase their productivity to survive.

It can be said, without fear of contradiction, that artificial arrangements like the one challenged in this case, will hinder, not increase the chances that sugar cane farmers and mills which process their sugar will be able to compete.

What beneficial purpose did the tying arrangements in this case have on the industry? Their primary purpose could not have been to guarantee a cane supply for the Oaklawn Mill, it was closed. At the same time that Teche Sugar was negotiating these leases with petitioners, they were negotiating a Toll Agreement to extract profit from

the cane supply they controlled. They knew that the Raceland Mill could not grind the cane that petitioners would produce. They simply believed that they had the power to gain control of the cane the petitioners would grow, and sought to profit from that power to the detriment of the farmers and the other local mills.

The district court, after six days of testimony and the examination of volumes of documentary evidence, concluded that this practice served no positive or beneficial interest in the marketplace.

The remarkable, if not incredible, final note of the appellate court on the concluding pages of its opinion defies logic and is directly and clearly contradicted by the evidence. The court speculates that Teche Sugar's illegal tying practice could actually enhance competition by ensuring the survival of mills in hard times. Imputing such a motive to Teche Sugar's conduct is questionable, but the clear factual consequence of their actions was the closure of one mill that they owned and the sale of the other. That the appellate court can find a "procompetitive" effect in these facts strains the imagination. The petitioners and other farmers who were subjected to these tactics were deprived of their economic freedom, their industrial liberty, and their important and rightful place in a free and open competitive market for land and milling services. Competition among mills in the area was distorted and emphasis placed on sweetheart deals with large landowners, rather than efficiency in production and service to the primary customers of milling services. The artificial profits created by the practice served no useful purpose in the industry and added unnecessarily to the costs of production. As the district court found:

"No benefit to society has been shown; the tying makes the cost of milled cane higher and acts to insulate the mills from the effects of competition. The tie in and its anti-competitive impact outweigh whatever benefit it might create." (Judge Rebecca F. Doherty, District Court Opinion (App., *infra*, App. 55).

CONCLUSION

In sum, the decision of the Fifth Circuit is erroneous, fails to accord due weight to the factual findings of the trial court, and is in conflict with prior decisions of this Court and four separate circuit courts on the issue presented. This case offers the Court an opportunity to correct the error of the appellate court, resolve the conflict its decision creates, and provide guidance in determining appropriate action under the Sherman Act. This Court's decision will have an impact on the entire sugar industry

and the agricultural community at large. Therefore, the Court should grant this petition.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4968

BREAUX BROTHERS FARMS, INC.,

Plaintiff-Appellee,

TECHE PLANTING CO., INC. and
FRANCIS PAT ACCARDO,

Plaintiffs-Appellees,
Cross-Appellants,

versus

TECHE SUGAR CO., INC.,
SOUTH COAST SUGARS, INC.,

Defendants-Appellants,
Cross-Appellees.

****

TECHE PLANTING CO., INC.,
FRANCIS PAT ACCARDO,

Plaintiffs-Appellees,
Cross-Appellants,

versus

TECHE SUGAR CO., INC.,
SOUTH COAST SUGARS, INC.,

Defendants-Appellants,
Cross-Appellees.

Appeals from the United States District Court
for the Western District of Louisiana

(Filed May 4, 1994)

Before WISDOM, HIGGINBOTHAM, and JONES, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

Teche Sugar Company, Inc., offered to lease to Breaux Brothers Farms, Inc., Teche Planting, Inc., and Francis Accardo land for farming sugar cane. Teche Sugar conditioned its offer on its choice of a processing mill. All three sugar farmers sued in federal district court alleging that the lease tied land to milling in violation of the Sherman Act, 15 U.S.C. § 1. The district court ruled in favor of the farmers and awarded damages. We are not persuaded that any tie of land to milling was supported by market power in the land or, relatedly, that any tie had the requisite effect on competition. We reverse.

I.

For several years Breaux Brothers, Teche Planting, and Accardo leased land in St. Mary Parish from the Prudential Insurance Company. They grew sugar cane on the leased land each year, which they processed at a mill they selected. The right to choose the mill is valuable. A mill that can ensure a supply of sugar cane in times of low sugar prices enjoys an economic advantage. The present dispute arose when Teche Sugar, then an owner of a mill, leased the land from Prudential. In an effort to assure cane for its mill, Teche Sugar offered to sublease

land to Breaux Brothers, Teche Planting, and Accardo at a lesser rental rate than it paid Prudential. Teche Sugar conditioned its offer on a lessee's processing its cane at a mill selected by Teche Sugar. Breaux Brothers agreed, but Teche Planting and Accardo declined the offer.

Teche Sugar at first directed the sugar cane that Breaux Brothers produced to the Oak Lawn Mill, which Teche Sugar owned. Teche Sugar was still unable to generate enough cane for its mill and closed it before its lease with Prudential expired. Teche Sugar then designated the Raceland Sugar Mill--owned by South Coast Sugars, Inc., the co-defendant and Teche Sugar's sister company[1]--as the site for processing Breaux Brothers' sugar. Teche Sugar allowed Breaux Brothers to send excess sugar that Raceland could not process in a timely fashion to a nearby mill, Sterling Sugar Mill. Subsequently, South Coast sold the Raceland Sugar Mill. Teche Sugar then struck a deal with Sterling by which Teche Sugar would pay Sterling a flat rate of $9 per ton to grind cane and Teche Sugar would then sell the product at whatever profit it could make. Teche Sugar had no financial interest in Sterling Sugar Mill.

II.

The farmers argue that the lease Teche Sugar offered constituted an illegal tying arrangement. A tying arrangement is the sale or lease of one product on the condition

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[1] Teche Sugar Company and South Coast Sugars, Inc., the two defendants, are both wholly owned subsidiaries of South Louisiana Sugar, Inc.

that the buyer or lessee purchase a second product. *See Northern Pacific R.R. v. United States,* 356 U.S. 1, 5-6 (1958). The land that Breaux rented and the grinding services of the mills are said to be separate products.

There is a strong support for the two product argument offered by the functional approach in *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2, 21-25 (1984). Whether two products exist "depends on whether the arrangement may have the type of competitive consequences addressed by the rule." *Id.* at 21 (footnote omitted). The argument continues that an owner of a dominant portion of a market in sugar cane land could route the cane its land produced to a mill under its control. This guaranteed source of sugar might allow it to drive other mills from the market. The land owner thus could transfer power in one market into power in another. This presents fairly straightforward antitrust doctrine, in theory. *See, e.g., Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 611 (1953) ("[T]he essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next."). Professor Kaplow has analyzed this danger and suggested that tying arrangements may cause harm even when they do not create power in a second market. Louis Kaplow, *Extension of Monopoly Power through Leverage,* 85 Col. L. Rev. 515 (1985). But we need not decide on these facts whether renting sugar cane land and grinding sugar cane constitute two separate goods. Assuming that they do and that the lease Teche Sugar offered therefore

amounted to a tying arrangement, the farmers have nevertheless failed to establish that the lease violated the Sherman Act.

We begin with first principles. Not all tying arrangements are illegal. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 24-25 (1984) ("[T]he fact that [a] case involves a required purchase of two [goods] that would otherwise be purchased separately does not make the . . . contract illegal.") As *Jefferson Parish* explained it:

> [T]he law draws a distinction between exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other. When the seller's power is just used to maximize its return in the tying product market, where presumably its product enjoys some justifiable advantage over its competitors, the competitive ideal of the Sherman Act is not necessarily compromised. But if that power is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures.

Id. at 14.

The legality of a tying arrangement depends in part on its effect in the tied market. The farmers acknowledge that Teche Sugar could have raised the rent it charged for its land, allowing the farmers to process their sugar cane at the mill of their choice. It is doubtful that Teche Sugar's decision to seek similar gains by controlling the

choice of mills violates the Sherman Act.[2] Our focus today is, however, whether the lease impaired competition in the sugar cane processing market such as creating barriers to the entry of new competitors into that market. *Jefferson Parish,* 466 U.S. at 14. Our analysis focuses on Teche Sugar's economic strength in the sugar cane land and milling markets. *Id.* at 18 ("In sum, any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact.").

The farmers may prevail under either of two approaches. First, to establish that the tying arrangement was illegal *per se,* the farmers must show that Teche Sugar exerted sufficient control over the tying market, sugar cane land, to have a likely anticompetitive effect on the tied market, sugar cane grinding. *Id.* at 15-18, 26-29. Second, the farmers may prevail by establishing that the arrangement is an unreasonable restraint of trade. *Id.* at 17-18, 29-31. *See also Fortner Enters. v. United States Steel Corp.,* 394 U.S. 495, 499-500 (1969) ("*Fortner I*"). We evaluate the reasonableness of the arrangement by exploring the "actual effect of the exclusive contract on competition" in both the tying and tied markets. *Jefferson Parish,* 466 U.S. at 29. We may find an antitrust violation to be an

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[2] *See, e.g.,* Richard Posner, Antitrust Law: An Economic Perspective 173 (1976) (claiming that no difference exists between profit from increase in price of tying product and similar gains made through forcing consumer to purchase tied product). *But see* Louis Kaplow, supra, at 520-25 (arguing that method in which market power is deployed may affect extent of harm to consumer).

unreasonable restraint of trade only if the tying arrangement has had an "actual adverse effect on competition." *Id.* at 31.

A.

A *per se* condemnation requires proof that the tying arrangement involved "the use of market power to force [consumers] to buy [goods] they would not otherwise purchase." *Id.* at 26. The *per se* rule, of course, obviates the need for full consideration of actual market conditions; it does require a finding of "significant market power" in the tying market. *See id.*

The farmers allege that Teche Sugar controlled as much as 17.5% of the land in the relevant market. They base this percentage on a narrow definition of the market of sugar cane land. Sugar cane farmers can feasibly transport their crop for processing no farther than twenty five to thirty five miles from their farms. Five mills operated within approximately thirty five miles of the land that Teche Sugar offered to farmers, an area encompassing the St. Mary and Iberia Parishes. Teche Sugar, South Coast and related companies controlled no more than 17.5% of the sugar cane farmland in St. Mary Parish and no more than 9.4% of the farmland in the two parishes combined.

The district court defined both products as the relevant market in sugar cane land. We find that even under the narrowest of reasonable definitions Teche Sugar lacked the requisite market power to trigger a *per se* violation.

Land that offers a distinct economic advantage based on its location may enhance market power. *See Northern Pacific R. Co. v. United States*, 356 U.S. 1 (1958). But possession of 17.5%, much less 9.4%, of a market is not normally sufficient to satisfy the requirements of the *per se* rule. The Supreme Court in *Jefferson Parish*, for example, found control over 30% of a tying market to fall shy of "the kind of dominant market position that obviates the need for further inquiry into actual competitive practices." 466 U.S. at 27. Some circuit courts have used 30% as a rough benchmark for the minimum amount of market power necessary to give rise to a *per se* violation of antitrust law. *See Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 797 (1st Cir. 1988) (finding insufficient market power for *per se* antitrust violation); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 655, 672 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986) (same).[3]

The farmers contend that it is a mistake to gauge Teche Sugar's market power by considering the percentage of its holdings in the relevant land market. Sugar cane land is a rare commodity, they argue, and as a result Teche Sugar garnered significant market power. But it is

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[3] We do not imply that a plaintiff may not provide direct evidence of market power, obviating the need to inquire into the percentage of the tying market that the defendant commanded. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. ___, 112 S.Ct. 2072, 2088 (1992) ("It is clearly reasonable to infer that [a defendant] has market power to raise prices and drive out completion in the after-markets, [where a plaintiff] offer[s] evidence that [the defendant] did so."). *Cf.* Stephen Calkins, Supreme Court Antitrust 1991-92: The Revenge of the Amici. 61 Antitrust L.J. 269, 301 (1993) ("The words 'per se' are conspicuously absent from *Kodak's* discussion of tying.").

only by defining the market for sugar cane land narrowly that the farmers can maintain that Teche Sugar controlled 17.5% of that market. This definition of the tying market includes only land in the St. Mary and Iberia Parishes and fully reflects the location of the land and the requirements of sugar cane production. All of the sugar cane grown in the parishes can be brought to the same set of mills for processing.

The farmer also allege that leases for sugar cane land generally span several years and that only a fraction of the sugar cane land in a market becomes available in a given year. As a result, they reason, Teche Sugar exercised considerable power over the market despite the relatively small amount of land it held. As proof of Teche Sugar's power, the farmers note that, although some sugar cane land was on the market, no adequate alternative land was available when Teche Sugar offered them a lease.

Were we to accept the farmers' theory, any land owner in a market where sales occur only periodically would possess significant market power, and every party in control of sugar cane land in St. Mary Parish would possess such power. At the Supreme Court stated in *U.S. Steel Corp. v. Fortner Enterprises*, 429 U.S. 610 (1977) ("*Fortner II*"): "[T]he question is whether the seller has some advantage *not shared by his competitors in the market for the tying product.*" *Id.* at 620 (emphasis added). *See also Will*, 776 F.2d at 672 (citing *Fortner II*). The farmers offer no reason to believe that Teche Sugar had an advantage over its competitors in the market for sugar cane land in St. Mary Parish. All of the owners of sugar cane land in the

parish possessed a scarce commodity. The farmers therefore provide an inadequate basis for the conclusion that Teche Sugar possessed sufficient power in the tying market to trigger *per se* condemnation of the lease.

The cases on which the farmers rely do not require the contrary conclusion. The Sixth Circuit's opinion in *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123 (6th Cir. 1981), is representative. The defendant in *Bell* controlled hangar and outdoor space at an airport. The defendant conditioned lease of the space on the plaintiff's purchase of all fuel, maintenance, and parts required to service the plaintiff's airplanes. *Bell*, 660 F.2d at 1125-26. The court found that the defendant possessed sufficient power in the market for airport space, the tying market, to render the tying arrangement a *per se* violation of antitrust law. *Id.* at 1127.30. The court based its conclusion on the fact that the defendant in *Bell* was "a dominant firm." *Id.* at 1129. Moreover, the court found that the defendant was "in a uniquely advantageous position" to sell space to a party attempting to establish a business of the plaintiff's variety. *Id.* at 1128 (internal quotation marks omitted). Other providers of airport space, the court noted, did not occupy the same advantageous position. *See id.* at 1128-29. The farmers in the present case have not shown that Teche Sugar held a dominant position in the sugar cane land market or that Teche Sugar's land conferred a market advantage not possessed by its competitors.

Similarly, in *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n*, 666 F.2d 1130 (8th Cir. 1981), the defendants conditioned purchase of cemetery lots on the plaintiffs' purchase from defendants of any foundation preparation necessary for the plaintiffs' grave memorials.

Id. at 1141. The defendants did not, however, merely tie purchase of one good to another; they also conspired to adopt a uniform tying arrangement policy in the industry. *Id.* at 1136-40. The court relied on the existence of this policy in concluding that the defendants' share of the market conferred significant economic power. *See id.* at 1143 ("[Defendants] accounted for 22 percent of the burials performed in the market area . . . , and the exclusive foundation preparation policy, upon which [plaintiff] bases its claim, is uniformly followed by nearly all of the cemeteries."). *See also Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207 (9th Cir. 1977) (finding antitrust violation where defendants controlled 78% of market in cemetery plots, to which they tied installation of grave markers). *Cf. Ringtown Wilbert Vault Works v. Schuylkill Memorial Park Inc.*, 650 F.Supp. 823 (E.D. Pa. 1986).

The farmers' reliance on *Ware v. Trailer Mart, Inc.*, 623 F.2d 1150 (6th Cir. 1980), is also misplaced. The defendant in *Ware* conditioned the lease of a lot in a trailer park on the purchase of a mobile home. *Ware*, 623 F.2d at 1152. The court held that the plaintiff had alleged in its complaint that the defendant possessed significant market power and further noted that even if the plaintiff had not made such an allegation, the omission would not preclude consideration of the plaintiff's claim under the rule of reason. *Id.* at 1153-54 (relying on *Fortner I*, 394 U.S. at 499). The court did not, however, address the issue of how much power the defendant had to possess to render the tying arrangement a *per se* violation of antitrust law.

B.

The farmers nevertheless may prevail if the lease constituted an unreasonable restraint of trade. *Jefferson Parish*, 466 U.S. at 29. Whether this arrangement was an unreasonable restraint of trade requires an additional "inquiry into the actual effect of the exclusive contract on competition" in the market for the tied good. *Id.* We need not explore whether Teche had sufficient market power in the market for sugar cane land, under a rule of reason test, because the tying arrangement did not hamper competition in the market for sugar cane grinding.

Teche Sugar not only failed to expand its presence in the sugar cane milling market, it also failed to maintain its presence. Teche Sugar closed the mill to which it first sent the sugar cane that Breaux Brothers produced. Teche Sugar then directed the sugar cane to the mill owned by its sister company, South Coast Sugars. Despite the advantage of a guaranteed source of sugar cane, South Coast sold its mill. The withdrawal of Teche Sugar and South Coast from the sugar mill grinding business belies the claim that Teche Sugar increased its power in the tied market.

Moreover, the farmers' contentions notwithstanding, Teche Sugar's later deal with Sterling Sugar Mill posed no threat to competition. Its terms required Teche Sugar to pay Sterling a set price to grind the sugar cane that Breaux produced. Teche Sugar in essence hired out a mill for a fixed fee. Produced sugar would be sold at the market on shares with its lessee.

When a party has no control over a tied market, the dangers usually created by a tying arrangement do not

exist. *See generally* 9 Philip E. Areeda, Antitrust Law ¶1726a, at 331-33 (1991). Teche Sugar had no incentive to dampen competition in the sugar milling market. Any decrease in competition would be contrary to its interests. Teche Sugar would have to pay any supracompetitive price its interference sparked. *See id.* at 332. Once Teche Sugar abandoned the business of grinding sugar, any threat that the tying arrangement might harm competition disappeared.

Teche Sugar did not eliminate competition among mills by directing sugar cane to its own mill. It attempted, unsuccessfully, to survive in the sugar milling market. This futile effort had no actual adverse effect on competition. *Jefferson Parish*, 466 U.S. at 31 ("Without a showing of actual adverse effect on competition, [the plaintiff] cannot make out a case under the antitrust laws" in the absence of *per se* liability.). As a result, there was no violation of antitrust law.

C.

As a final note, the tying arrangement held the potential to enhance competition. The sugar cane market is volatile. When sugar cane prices drop, farmers produce less cane. Mills have a difficult time weathering long seasons with slack demand. Once a period of economic duress has passed, significant costs confront any party entering into the sugar cane grinding industry. Mills may survive hard times by securing sources of sugar. The continued existence of the mills may ensure that there is *greater* competition when the sugar cane grinding business once again proves lucrative. Such a procompetitive

effect tends to counter the anticompetitive tendencies of a tying arrangement and are relevant to any inquiry into an alleged antitrust violation. *See Grappone*, 858 F.2d at 799-80 (reviewing this line of cases).

III.

The farmers complain about the lease terms Teche Sugar offered to them. All the farmers but Breaux rejected the lease. The problem is not, under these circumstances, a market failure. Rather, an excess of farmers eager to rent sugar cane land put the farmers in a vulnerable position. The farmers suffered because of competition, not its absence. Their personal plight is unfortunate. But competition has not been injured and the antitrust laws offer them no relief.

REVERSED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

BREAUX BROTHERS FARMS, INC.	CONSOLIDATED FILE CIVIL ACTION NUMBER: 90-2536
VERSUS	JUDGE REBECCA F. DOHERTY
TECHE SUGAR COMPANY, INC. AND SOUTH COAST SUGARS, INC.	MAGISTRATE JUDGE METHVIN

MEMORANDUM OPINION

(Filed May 14, 1992)

FACTUAL NARRATIVE

This action challenges the legality of a five-year lease of sugar cane farm land offered by defendant Teche Sugar Company, Inc. to the three plaintiff farmers. As a condition of farming the land, the lease requires plaintiffs to take their sugar cane to the mill designated by defendant. Plaintiffs say this illegally ties the leasing of farm land to the use of designated sugar mills in violation of Section 1 of the Sherman Act (15 U.S.C. §1). Plaintiffs seek actual damages caused by the illegal tie, trebled, costs and attorneys fees. Two plaintiffs have brought state-law claims for expenses incurred through preservation work done on defendant's land.

For the reasons set forth below, the Court finds that the lease offered by defendants is an illegal tying arrangement which violates federal antitrust law.

THE PARTIES

Plaintiffs are two agricultural corporations and an individual farmer, all of whom originally farmed land in St. Mary Parish under leases with Prudential Insurance Company, the land owner. Prudential thereafter negotiated the right to lease this land to Teche Sugar under a "master lease" forcing the farmers to renew their leases with Teche Sugar. Teche Sugar interjected a mill designation provision in the leases.

Breaux Brothers Farms, Inc. ("Breaux Brothers") is a Louisiana corporation owned by Herbert Breaux. It alone actually executed a new lease (containing the designated mill provision) with Teche Sugar.

Teche Planting, Inc. ("Teche Planting") is a Louisiana corporation owned by Donald and Larry Chauvin, two brothers. It also farmed land owned by Prudential but refused to sign a lease with Teche Sugar in 1990, and ceased farming that land. Teche Planting had other land under lease which it continued to farm.

Francis "Pat" Accardo ("Accardo") is an individual, unincorporated farmer who farmed under a lease with Prudential, and who refused to sign a new lease with Teche Sugar. He left the land, ceased farming for one year, and then began farming a tract of land which Accardo argues is smaller and less productive than the Prudential tract.

Teche Sugar Company ("Teche Sugar") and South Coast Sugars, Inc. ("South Coast") are sister companies

who are defendants in this matter.[1] Teche Sugar was the owner of the Oaklawn Mill, which was located on the same Prudential estate which certain plaintiffs were farming. South Coast was the owner of the Raceland Sugar Mill, located in Raceland, Louisiana,[2] approximately 72 miles from the plaintiffs' farms.

BACKGROUND

Sugar cane farmers, sugar mills, and farmland are an interdependent triangle. Farmers cannot market their crop except through a mill which turns the cane into a usable commodity. The mills, in turn, require raw materials from the farmer. The farmer requires land to produce his crop; because land is available in only finite quantities, farmers' sources of land are necessarily limited.

When sugar prices are good, more sugar cane is grown and land becomes more desirable. More crops mean a greater demand for mill services. Conversely, when sugar prices are low, or lower than other crops such as rice or soybeans, the amount of sugar cane produced decreases, along with the demand for mill services. Sugar

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[1] Both defendants are wholly owned subsidiaries of South Louisiana Sugar, Inc., which in turn is owned by South Coast Investment Company. Caneland, Inc. also a wholly owned subsidiary of Teche Sugar Company, Inc., and also executed master leases with landowners and subleases containing designated mill provisions with farmers.

[2] Raceland Sugar Mill is the wholly owned subsidiary of Teche Sugar as well.

cane farm land, in turn, is less desirable; therefore, more available.

As sugar mills face large initial fixed costs, mill owners seek a constant supply of sugar cane each grinding season, and therefore, attempt to shield themselves from fluctuations in crop production levels. To ensure a constant supply of cane, mill owners have, at various times, purchased and farmed unused land themselves, negotiated with farmers to bring their cane to their mill and, in the present case, defendants purchased the right to lease farm land under "Master Leases" so that, by controlling the land, defendants can control the farmer's decision of which mill to use.

Initially, Teche Sugar conceived of the "master lease" arrangement in order to ensure a reliable source of sugar cane for its Oaklawn Mill. This mill was located on the plantation on which certain plaintiffs farmed. By interjecting themselves between the land owner, Prudential, and the farmer, Teche Sugar hoped to stabilize the supply of sugar cane to its mill and thereby stabilize its income, thus making the Oaklawn Mill profitable. It was willing to pay more rent to Prudential than it would charge the farmer in order to gain this steady supply, thus creating a loss.

Teche Sugar planned to make up these losses through its sugar mill operations, and therefore added a requirement to each lease that each farmer take all of the cane produced on that land to a sugar mill to be designated by Teche Sugar. In order to continue farming the land, the

farmer would have to accept the designated mill provision. It is this that plaintiffs label an illegal tie and which is the subject of this lawsuit.

However, Teche Sugar closed the Oaklawn Mill following the 1989 grinding season, after the "master lease" was executed but before the "master lease" expired. Nonetheless, Teche Sugar kept to its original plan, and simply designated the Raceland Sugar Mill, owned by South Coast, as the mill to which Breaux Brothers and its other sublessees must take their cane.[3]

The Raceland mill, in turn, was sold in 1991 after the execution of the "master lease" but before it expired. Thereafter, Teche Sugar was left with the power to designate the sugar mill, but with no mill to support. Rather than delete this provision, Teche Sugar entered into an agreement with Sterling Sugar Mill, whereby it agreed to pay Sterling a flat $9.00 per ton to grind the cane diverted to Sterling's mill via the designated mill provision. Therefore, Teche Sugar made a profit which was the difference between the price obtained by the mill for the sugar when sold and the $9.00 per ton rate it paid Sterling. This was approximately a $4 to $6 per ton profit in 1990. Teche Sugar used this money, in part, to cover the losses it was incurring in paying more rent to Prudential than it collected from the farmers.

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[3] Before the 1990 grinding season ended, however, Teche Sugar agreed to allow some of Breaux Brothers' cane to be taken to the nearby Sterling mill because the Raceland mill was unable to grind the cane quickly enough to allow the Breaux Brothers to get its entire crop out of the field timely.

At least 225,000 tons of sugar cane were delivered in 1990 to either the Raceland or Sterling mills as a result of the designated mill provisions contained in the subleases offered by Teche Sugar and/or South Coast. This "designated" cane had a total approximate value of more than, $9 million, and resulted directly from "master leases" executed by either Teche Sugar or South Coast and landowners.

Teche Planting and Accardo refused to sign the lease containing the designated mill provision, and left the land at Oaklawn Plantation. However, they found it difficult to replace the farm land they had rejected, and neither party farmed in 1990. Accardo ultimately found land in the area and resumed farming; Teche Planting did not replace the acreage lost.

Each farmer preferred to farm near his home, ideally no more than three to five miles away, therefore, both looked (unsuccessfully) in St. Mary Parish and/or the border of Iberia Parish for land. In 1991 Accardo eventually found land in St. Mary Parish but argues it was of smaller acreage and less productive than the land at Oaklawn Plantation.

Faced with the choice of losing its leased land, Breaux Brothers objected to the designated mill provision, but ultimately entered into a lease with Teche Sugar. However, this meant Breaux Brothers was deprived of the opportunity to negotiate its own terms with the mill of its choosing.

The selection of a mill is determined, at least in part, by distance. Farmers, including plaintiffs, testified their costs were reduced when the mill was nearby, even

though mills reimburse farmers for most, if not all, of the direct transportation costs.

The distance between the farm and the mill dictates, in large part, whether the cane is hauled by tractor or is transloaded by truck. The method of hauling sugar cane and the payment made for the different methods are also important factors in the choice of a mill. Hauling by tractor is the traditional method of taking cane to the mill, but it is economically feasible only when the mill is five plus miles from the farm. Tractors arguably are a less safe method of hauling as they move slowly, create road hazards for the general public, and the carts are prone to tip over. Mills pay a hauling fee to the farmers when the farmers haul the cane by tractor; the farmer provides the tractors, carts and manpower involved.

Transloading is generally thought to be a safer but more expensive method of hauling. In order to transload, farmers who have not transloaded before are required to purchase additional equipment. Under certain circumstances this equipment is furnished by the mills; Raceland furnished transloading equipment to Breaux Brothers for use during the 1990 grinding season.[4] The mills traditionally pay a transloading fee to the farmer; in gross amount, the amount paid is less than the tractor hauling fee.

Other factors in the choice of a mill include less identifiable costs, such as the amount of work time lost

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[4] This reimbursement was not part of the original lease negotiation, however, and reimbursement was not offered to Teche Planting or Accardo.

because of slow turn around unloading cane at the mill, mill efficiency or inefficiency, the mill's payment record and timing of payment and its effect on the farmer's cash flow, and incentives offered the farmers to obtain their business. Subjective criteria, such as loyalty to a mill, personal relationships with employees and managers of a mill, and the mill's willingness to assist the farmer through difficult times are also factored into a farmer's decision to select a given mill.

Mills buy the cane from the farmer for a certain percentage of the crop, and pay the amounts owed to the farmer on a staggered schedule. Although the percentage paid is rather standard in the industry, the timetable of payment varies. The timing varies the profits of the farm, as most farmers operate on borrowed money. The sooner the farmer can retire the debt, the sooner he can stop paying interest.

There are five area mills in the St. Mary/Iberia Parish area. Sterling is one of the five mills and the only private mill in St. Mary Parish. St. Mary Co-op is a cooperative mill in St. Mary Parish owned by the farmers. There are three mills in Iberia Parish, two co-op mills (owned by the farmers) and one private. Each mill, whether private or co-op, seeks to attract farmers from approximately a 25-mile radius, although cane is on rare occasion brought in from greater distances. Transporting cane beyond 25 miles becomes economically unsound except under the most unusual circumstances.

Teche Sugar, South Coast and its related companies[5], according to uncontradicted testimony, controlled no more than 17.5 percent of the sugar cane farmland in St. Mary Parish at any time in the past five years. The percentage is reduced to no more than 9.4 percent if the geographic market is expanded to include St. Mary and Iberia Parishes.

The farmers who replaced Teche Planting and Accardo on the Teche Sugar/Prudential leases traveled from Iberia to St. Mary Parish, and farmed land in both parishes. Indeed, there were many farmers who commuted to the land they farmed, one as far away as 44 miles, and many from 25 to 30 miles away.

These farmers who commuted testified they, too, would have preferred to live closer, but there was no indication that the practice of farming created any hardship that commuters in other professions did not also face. Clearly, it is economically feasible to commute at least 25 to 30 miles from home to farm, as many farmers are so doing.

LEGAL ANALYSIS

The matter which is before this Court is whether or not the contracts entered into between defendants and plaintiffs and in particular the portions of those contracts requiring plaintiffs to surrender to defendants their rights to select the mill to process their sugar cane to defendants

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[5] See note 1.

is a tying agreement and whether or not that tying agreement is in violation of the Sherman Anti-trust Act 15 U.S.C. §1, 2. Because the issue before this Court has such broad and potentially lasting effect and impact and because the facts do not lend themselves to specific analysis under any one case, this Court has reviewed the historical development of jurisprudence dealing with Sherman Anti-trust violations and in particular, "tying" violations.

The Sherman Anti-trust and anti-trust legislation in general has been subject to numerous Supreme Court opinions ranging from *Chicago Board of Trade v. United States,* 246 U.S. 231 (1918) to *Jefferson Parish Hospital District No. 2, et al v. Hyde,* 466 U.S. 2, decided in 1984. Circuit court decisions dealing with this issue throughout the same historical period and post-dating the *Jefferson Parish* decision have been reviewed as well. In 1958, the U.S. Supreme Court explained the purpose of the Anti-trust Act in *Northern Pacific Railway Co. v. United States of America,* 356 U.S. 1, at 4 (1958).

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade . . . the policy unequivocally laid down by the Act is competition. And to this end it prohibits 'every contract' combination . . . or conspiracy, in restraint of trade or commerce among the several States'. Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition."

Later, in *Fortner Enterprises, Inc. v. United States*, 394 U.S. 495, 502 (1969), the Court elaborated upon its view of the policy behind the Sherman Act noting that:

> "As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private anti-trust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in *free competition.*" (emphasis added)

The facts before this Court do not require an exhaustive analysis of the entirety of the Sherman Anti-trust Act, rather, at issue in this case is the validity of a specific contract entered into between defendants and plaintiffs which contains language agreed to be a "tying agreement." Therefore, this Court must decide whether or not the contract and its alleged tying provision give rise to a per se violation of §1 of the Sherman Act, i.e., whether a contract that requires the farmers who lease the land to abdicate their right to select the market for their sugar cane is a per se violation of the Sherman Anti-trust Act, and if not, whether the contract is nevertheless illegal because it unreasonably restrains competition under a Rule of Reason analysis.

The Supreme Court in its historical development of jurisprudence on tying and per se violations has noted that there are certain agreements and practices which because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Citing *Northern Pacific*, 356

U.S. at 5. Tying agreements are unreasonable in and of themselves "when a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected." *Northern Pacific,* 356 U.S. at 6. Of course, where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most." Id., at 6-7.

Some 25 years later in *Jefferson Parish, supra* the Court reviewed its jurisprudential history of this issue by saying "Our cases have concluded that the essential characteristic of an invalid tying agreement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all or might have preferred to purchase elsewhere on different terms. When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." *Id.* at 12. The Court continues, citing *Times Picayune Publishing v. United States,* 345 U.S. 594, 605 (1953) " . . . conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers, independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market." The Supreme Court has specifically defined tying as " . . . an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product or at least agrees that he will not purchase that product from any other

supplier." *Northern Pacific,* 356 U.S. at 5-6. When dealing with tying, competitors are denied "free access to the market for their tied products not because the party imposing the tying requirements has a better product or lower price, but because of its power or leverage in another market." *Northern Pacific,* 356 U.S. at 6. "At the same time buyers are forced to forego their free choice between competing products. For these reasons 'tying agreements fare harshly' under the laws forbidding restraints of trade." *Northern Pacific,* 356 U.S. at 6.

In the Supreme Court's most recent ruling on the matter, the Court defines the issue as; "The answer to the question of whether petitioners have utilized a [illegal] tying arrangement must be based on whether there is a possibility that the economic effect of the arrangement is that condemned by the rule against tying – that petitioners *have foreclosed competition on the merits in a product market distinct from the market for the tying item."* (emphasis added) *Jefferson Parish, supra* at 21. The Court notes that the per se rule against tying can be coherent only if tying is defined by reference to the *economic effect of the arrangement* as the Sherman Act does not prohibit *tying,* rather it prohibits *contracts in restraint of trade* thus, in a sense, the question of whether tying is involved is beside the point. *Jefferson Parish,* 466 U.S. at 21, n. 33.

The Supreme Court has declared the policy behind the Sherman Anti-trust Act to be an attempt to *identify* and *control* tie-ins which have *demonstrable exclusionary impact* on the *tied market* or *abet harmful exercise of market power. Jefferson Parish,* 466 U.S. at 35 (O'Connor, J., concurring).

Therefore, to establish that a tying provision is a per se violation, one must show that the tying agreement exists, that it is unreasonable in and of itself because of the pernicious effect on competition, i.e., a demonstrable exclusionary impact on the tied market or abetting harmful exercise of market power, and a lack of any redeeming virtue.

Here there is no doubt and it is not contested by either party that the provision of the contract at issue is a tying arrangement; therefore, one must move to the next level of inquiry and establish that sufficient control over the tying market exists to have the necessary pernicious effect. Inherent in this inquiry is a definition of the *market* or markets involved. The Supreme Court noted in *Jefferson Parish* that any inquiry into the validity of a tying agreement must focus on the *market or markets in which the two products are sold* for that is where the anti-competitive forcing has its impact. There must be a demonstration of sufficient control over the *tying market* to appreciably restrain free competition in the *tied market*, i.e., a demonstration that the seller can force the purchaser to buy tied products they do not want or want on substantially different terms and that not an insubstantial amount of interstate trade is affected. Bottom line, plaintiffs must establish that the tying is economically harmful because the power and the market for the tying product has been used to create *additional power* in the tied market. *Jefferson Parish*, 466 U.S. at 36 (O'Connor, J., concurring).

In *Jefferson Parish* the Court's analysis of market within the tying issue focused on the hospital's sale of

services to its patients rather than its contractual agreements with the providers of the anesthesiological services. In *U.S. v. Philadelphia National Bank*, 374 U.S. 321 (1963), at 357, the Court outlined the market inquiry as "The proper question to be asked in this case is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, *the effect of the merger on competition will be direct and immediate.*" (emphasis added) Therefore, "the area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and *to which the purchaser can practically turn for supplies.*" (emphasis in original) *Id.* at 359. The Congressional intent in defining market was explained by the Supreme Court in *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962), at 336 under an analysis within the Clayton Act – which has been deemed to be the same under the Sherman Act – "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, both 'correspond to the *commercial realties' of the industry* and be *economically significant*. Thus, although the geographic market in some instances may encompass the entire nation, under other circumstances it may be as small as a single metropolitan area." (emphasis added)

Plaintiffs argued that the relevant market for the tying product is St. Mary Parish; defendants argued ably that the market should be defined broader than St. Mary Parish. Plaintiffs argue St. Mary Parish defines the market for land because farmers need to live near, i.e. three to five miles from the land on which they farm and all

plaintiffs reside in St. Mary Parish. However, the record is replete with testimony from farmers who commute to the land they farm, some from as far away as 44 miles with several who testified they commute 25 to 30 miles to farm, *crossing the St. Mary/Iberia Parish lines.* Although the farmers testified they did not *want* to commute, the clear testimony showed that the practical realties of the farming industry today is that farmers *do commute* to their land.

Plaintiffs proved that farmers *desire* to live on the land they farm or no more than 3 to 5 miles from their land; however, plaintiffs did not prove that it is *necessary* under the *commercial realities* of the industry for farmers to live 3-5 miles from their land. It was established by evidence presented that sugar cane farmers must farm land in an area which can be serviced by operating sugar cane mills. It does not seem reasonable to this Court that the definition of the relevant market as to the tying product should be defined by the buyers' *preferences,* i.e., in this case, the farmers' *preference* – rather than any economic necessity or commercial reality of the industry. Each of the reasons given by the farmers and the expert brought by plaintiffs to bolster the farmers, arguments are reasons applicable to anyone who works and in particular, anyone who owns a business, i.e., a store, restaurant, etc. It is certainly *preferable* that one live near the location of his business so that he can minimize the transportation costs required to travel to and from work and deal with vandalism, problems on site with equipment and/or the building, problems with the weather when the weather threatens the building, structure and/

or business. Anyone would *prefer* to live in close proximity to where they work in order to minimize transportation costs and inconvenience. However, this Court did not hear sufficient credible evidence to establish any unique requirements of the farming industry that would establish a *commercial reality* of the farming industry which *necessitates* the farmers living within five miles of the farm. This Court finds no jurisprudence which convinces it the *preference of* the buyers, i.e., the farmers in this matter, should define the relevant market for the tying product.

Rather, this Court finds the jurisprudence establishes that the *commercial realties* of the sugar cane industry, the competitive area involved and the *economic significance* should dominate the definition of the market. It was established by evidence presented that sugar cane farmers must farm land in an area which can be serviced by operating sugar cane mills. Based upon the more credible evidence presented, particularly by the farmers and sugar mill operators, this Court finds the area within reasonable transporting distance to the local sugar cane mills to be the relevant geographic market in the tying product. Land has reduced, if any value for growing sugar cane if the cane grown on that land cannot be processed by a mill or if transportation costs required to get the cane to the mill are so great as to destroy any profit for the farmer or the mill. Evidence showed that there are five operating sugar mills in and around the St. Mary/Iberia Parish area and sugar cane can be transported 25 to 35 miles and still remain an economically sound practice. (Brandon Bates of the St. Mary Coop

testified to this as did Fred Clark, vice-president of Sterling Mills.) Consequently, the market area in which the seller, i.e., the master lessor, operates, i.e., leases land which is desirable as sugar cane land, is the area within reasonable transport distance of the local sugar mills. Further, sugar cane mills cannot operate without a steady source of sugar cane to the mill. Therefore, the area to which the farmers can practicably turn for *mill services* is the area where mills can effectively operate, i.e., where there is a cane supply to mill and where land exists which can be farmed for sugar cane. The area to which the farmers can practicably turn for *land* to farm is the same geographic area, i.e., the area where mills operate, for one must have a *mill* which can service the cane grown on the land – the five local sugar mills provide that service. Consequently, the area including the reasonable, economically practical transport distance to these mills is found to define the geographic limits of the markets. Although this Court does not doubt that the farmers would *prefer* to live on or within five miles of their farm, the relevant and credible evidence presented demonstrated no unique characteristics of farming which would *require* the farmers live in closer proximity to their land than the defined market. However, the evidence firmly establishes the interdependency of the farmer and the mills and the economic reality of the industry which defines the markets involved.

Plaintiffs must establish that defendants had sufficient control over the *tying market* so as to appreciably restrain free competition in the *tied market*. *Northern Pacific*, 356 U.S. at 6. Therefore, one must also define the "tied market." Although it is clear that the geographic

market in the tied and tying products need not *necessarily* be the same, *Jefferson Parish,* 466 U.S. at 29, this Court finds that because of the commercial realities of the sugar cane industry and the unique relationship between the production of sugar cane and the milling of that cane, the geographic markets for the *tied* and *tying* products are the same. Sugar mills cannot survive without a stable supply of sugar cane to mill; sugar cane land loses part or all of its value if there is no mill which can economically mill the cane. The two are interdependent. Therefore, the geographic markets are the same.

Next, this Court must determine if defendants had sufficient control over the tying market to appreciably restrain free competition in the tied market. Within the tying market it is clear from the evidence produced that even if this Court were to accept the plaintiffs' argument that only St. Mary Parish is the relevant geographic market, defendants and their related companies *do not* have control over a sufficient amount of property so as to meet the standard set forth in *Jefferson Parish, supra.* There, the Court found that control over 30% *of the market* was not sufficient; in this matter, reviewing *all facts in a light most favorable to the plaintiffs,* defendants *do not control* 30% of the available sugar cane land *even in St. Mary Parish.* However, the inquiry does not stop there. Plaintiffs argue land, by its nature reduces the requisite burden in showing market power. Support for this argument is found in the seminal cases of *Northern Pacific Railway,* 356 U.S. 1 (1958), *Fortner,* 394 U.S. 495 at 503 and *Jefferson Parish, supra.*

Northern Pacific Railway, 356 U.S. 1 (1958) and following cases established that control of certain *unique types of*

land can, by the nature of the product involved, create the necessary special ability or *market power*. However, this Court is convinced from a review of the jurisprudence that control of *land* in and of itself does not grant that special ability/market power. Rather, the land involved must be *unique* as in *Northern Pacific Railway* where the land was contiguous to the railroad. A strong argument can be made that large contiguous tracts of sugar cane land within practical transport distance of operating mills are unique and evidence was presented to support this argument. However, to limit the focus of inquiry to this narrow issue without evaluating the underlying rationale and policy would be short sighted. Clearly, the true inquiry is the broader question of whether or not sufficient control or power exists in the market to *manipulate* economic markets and the working of *competition* therein.

In *Jefferson Parish, supra* the Court cited *Northwest Pacific Railroad* where the railroad controlled vast tracts of western real estate located contiguous to the railway noting this gave the railroad a unique kind of *bargaining power* that enabled it to tie the sales of that land to exclusive long term commitment contracts and thereby fenced out *competition* in the transportation market. The particular land involved was often prized by those who purchased or leased it and was frequently essential to their business activities. *Jefferson Parish, supra* at 17 citing *Northern Pacific Railway*. The land before this Court, i.e., large contiguous tracts of sugar cane farm land, is also prized by those who lease it and is essential to the business of sugar cane growing. The "preferential routing" clauses, i.e., tying agreements in *Northern Pacific Railway* conferred no benefit on the purchasers or lessees of the

land; the tying agreement before this Court confers no benefit on the purchasers or lessees, i.e., the farmers. While the lessees or purchasers in *Northern Pacific Railway* obtained the land they desired they yielded their freedom to deal with competing carriers in order to do so; defendants in that case made no claim that the land came any cheaper than if the restricted clauses had been omitted. Here, the farmers could have obtained or did obtain the farm land they desired, but did so by yielding their freedom to deal with competing mills; defendants made no claim that the land came any cheaper to the farmers than if the restricted tying agreement had been omitted. The major distinction between *Northern Pacific Railroad, supra* and the matter at hand is the *purpose* for the restrictive agreement. In *Northern Pacific* the railroad's purpose was to fence out competitors, i.e., to stifle competition. Here, evidence showed the *original* purpose of the tying agreement was to provide a stable and secure cane supply to defendants' Oaklawn Mill and once Oaklawn closed, to provide a profit base for their Raceland Mill until Raceland was sold and thereafter to provide an income stream to service the illusory land lease contracts entered into in order to capture the cane. Defendants' no longer own or operate any sugar cane mill – Oaklawn closed in January, 1990; Raceland was sold in late 1991. However, the tying *agreements* still exist and are the subject of a *tolling agreement* with Sterling Mill, i.e., Teche Sugar pays a flat fee to Sterling for each ton of cane delivered by defendants, a delivery made possible by the Master Leases. Sterling then pays Teche Sugar the amount of money Sterling normally receives as its profit for grinding the sugar. This difference between the flat

rate and the mill's normal profit is the "bounty" which Teche Sugar receives from its control over the sugar cane. Therefore, the purpose of defendants' tying agreement is no longer to secure a stable supply of cane for *their mills*, but rather to secure funds to offset the loss created by their contracts.

Defendants entered into contracts with the land owners paying an *above market* rate for land to lease and subleased the land to farmers at the *market rate*, thus creating an illusory result. However, defendants anticipated recouping this loss from profit made in their sugar mills from the processing of the cane they controlled through the tying agreements. Once the Oaklawn Mill was closed and the Raceland Mill sold, defendants were left with the land leases requiring them to pay an above market rate to the land owners and their land leases to the farmers which charged only the market rate; therefore, defendants were left with a loss. It is this loss defendants attempt to recoup through the tolling agreements. Consequently, once Oaklawn was closed and Raceland was sold, defendants did not release the cane from the tying agreements, rather took that dedicated cane and marketed it to the Sterling Mill for a bounty of $9.00 per ton for cane delivered. Clearly, the purpose for the continued existence of the tying agreements is to service defendants' contractual obligations.

Defendants created an artificial market by interjecting themselves between the land owner and the farmer, manipulating the price of lease land, substituting themselves for the farmer in dealing with the mills as to dedicated cane. By so doing, whether intended or not, defendants have not only *manipulated* competition in the

tied market but have effectively *eliminated* competition among the mills as to the dedicated cane. By manipulating the leasing of land, i.e., the tying market, the defendants have completely usurped the market as to the mills and the mill's consumers, the farmers, i.e., the tied market and thereby created market power in a market where they had none. The present arrangement completely strips the consumer, i.e., the farmers of their access to their market, i.e., their ability to sell the crop they produce to the mill of their choice and thereby completely insulates the mills from the beneficial stress of competition.

Sugar cane farming is unique as the farmers can only market their cane through a mill – mills are their market – and mills can only process sugar cane; the producers of that cane heretofore have been their consumers. Under the present circumstances, an entire market and the *competition* within that market vis a vis the farmers, has been destroyed. As long as the bounty is paid to the master lessors by the contracting sugar mill, the sugar mill need not be responsive to the needs and desires of the consumer of their services, i.e., the farmers. This will act to insulate the mills from the beneficial effects of competition and could perpetuate inferior practices within the mill or insulate an inferior mill from the beneficial effects of competition altogether. In other words, under the existing system a mill could be very inefficient, could exploit the farmer on the price to be paid for the cane and the time table for payment, (quite an important factor for farmers who borrow the money to plant and harvest their crop) and could place whatever conditions it wishes upon the farmer as to the milling of the cane and the *farmer*

would have no recourse and/or no power within the market to counter. Competition in the tied market among the mills as to the consumer, i.e., the farmer and his product, has been destroyed. As to those farmers subject to tying agreements, all power in the tied market is now held by the master lessor who prior to the master lease *had no power* therein.

As long as the master lessor obtains his bounty there is no reason for him to have further interaction with the mill or for the mill to be sensitive to the consumer's, i.e., the farmer's needs. Further, the artificial bounty paid by the mill must be accounted for in the market in some manner. Fred Clark, vice-president of Steriing Mills, testified the bounty paid by his mill to the master lessors increases the sale price of the milled sugar. Although defendants argue the intricate regulatory scheme controlling sugar should preclude such an effect on the market, this argument is in direct contradiction to the very credible testimony of the vice-president of Sterling Mills, i. e., one who has direct knowledge as to how the $9.00 bounty is being handled by his mill and one who has no direct stake in this litigation. Consequently, whether initially intended or not, the end result of the master lease and subsequent tolling agreement, is to create an artificially inflated market in the tying market, destroy competition in the tied market among the mills as to the consumer of the services provided, i.e., the farmers, insulate the mills from their own inefficiency, and increase the cost of milled sugar to the ultimate sugar consumer. In return the only *potential* benefit of the arrangement is to the land owner through the artificially high price paid for the lease and to the defendants' through recoupment of the

loss created by their own contracts and decision to close Oaklawn and sell Raceland *before their* master leases had expired thereby removing their opportunity to recoup their loss through profits made by their mill grinding the dedicated cane. This result in no way increases the stability of the mills, land or sugar cane markets. It artificially increases the cost of the sugar cane land, thereby increasing the cost of production. It does not benefit the mill to which the cane is dedicated, per the testimony of Mr. Clark, vice-president of Sterling Mills; it increases the cost of milled sugar and creates an environment conducive to driving out competing mills and making it more difficult for new mills to enter the market and/or competing mills to expand. Therefore, the tying arrangement as it exists today, has no legitimate business purpose other than to protect defendants from the effect of their own business decisions. Any possible argument of benefit, as a stable source of cane is provided to the selected mill, has been defeated by testimony by Sterling sugar's vice president who testified no benefit was created. Further, the same result can be accomplished in a less restrictive manner, i.e. – through agreements made *directly* with the consumer/farmer. Testimony was presented that such agreements did and do exist. These agreements can provide the needed stability of a cane source for the mills and still maintain the beneficial stresses of competition. Therefore, the tying provision as it exists results in an appreciable restraint on competition – it destroys it all together as between the mill and its consumer, i.e., the farmer and provides no benefit to society.

Under the evidence presented, this Court found nothing which would prohibit the defendants, or other

parties, from sustaining and/or manipulating the artificial market created by defendants, i.e., from obtaining master leases on additional acreage as it becomes available, paying the artificially high market price to the land owner for that land, subleasing the land to farmers for market value or an even higher premium, requiring the tying provision, and entering into tolling agreements with existing mills for a bounty. Although there was limited testimony that defendants might not increase their land holdings, there was not sufficient credible evidence presented to this Court to convince it that the practice by defendants or others would not continue or expand. Nonetheless, this begs the question. Whether or not a situation which has the *potential* to completely eliminate an existing competitive market and substitute an artificial non-responsive market with parties who otherwise would have no power within that market should exist under the law is the better question.

The Court in *Fortner, supra* at 503, keyed to the *lack of legitimate business purpose* which could not be achieved in some less restrictive way and the presence of appreciable restraint on competition. *Fortner, supra* at 503, establishes that market power, can be inferred from the "tying market's desirability to the consumer or from uniqueness in its attributes" and that "economic power over the tying product can be sufficient even though the power falls short of dominance and even though the power exists only with respect to some of the buyers in the market." "Such appreciable restraint results whenever the seller can exert *some power* over *some of the buyers* in the market, even if this power is not complete over them and over all other buyers . . . "

Consequently, not only is the question whether or not the defendants had sufficient power within the defined market to force or to make forcing of farmers probable, or if such economic power can be inferred by the product's desirability to consumers and its uniqueness, but more importantly, the inquiry is whether or not the tying arrangement has a legitimate business purpose which could not have been achieved in some less restrictive way and if the tying arrangement results in an appreciable restraint on competition.

The testimony of each of the plaintiffs and several farmers who were brought as witnesses clearly show that the defendants had sufficient power to impose the tying arrangement with respect to at least certain buyers within the market; therefore, an inference of some special economic power in the market might be made. The Court in *Fortner, supra* noted that "Since in a freely competitive situation buyers would not accept a tying agreement obligating them to buy a tied product at a higher price than the going market rate, this substantial price deferential with respect to the tied product (pre-fabricated houses) in itself may suggest that respondents had some special economic power in the credit market." Here the testimony clearly establishes that given their choice, farmers would not accept a tying agreement obligating their cane to a specific mill. However, in order to lease the large contiguous tracts of sugar cane land which become available only cyclically, they accepted the tie or left the land. This acceptance of the tying provision and/or withdrawal from the market suggests some special ability or market power on behalf of the Master Lessors.

However, the question still remains whether or not sufficient power existed to force this on an appreciable number of buyers within the relevant market. As noted, the Court in *Fortner, supra* refused to key to the number involved, rather, keyed to the *effect on economic competition.* "Application of the per se rule focuses on the *probability* of anti-competitive consequences." *Jefferson Parish, supra* at 15-16 (emphasis added) "The same strict rule is appropriate in other situations in which the existence of market power is *probable.*" *Jefferson Parish, supra* at 17 (emphasis added) "When the seller's share of the market is high [citing *Times-Picayune, supra*] or when the seller offers a unique product that competitors are not able to offer, [citing *Fortner 1, supra*] the Court has held that the *likelihood* that market power exists and is being used to restrain competition in a separate market is sufficient to make a per se condemnation appropriate." *Jefferson Parish,* 466 U.S. at 17.

It is clear from the more credible evidence presented that forcing is not only probable but exists as to the land controlled; therefore, as the amount of land controlled increases so does the potential for forcing. If this situation is allowed under the law it presents an open invitation to the defendants, third parties or the **land owner** to further manipulate the markets, i.e., to insert a tying arrangement and then sell the dedicated cane to mills and again eliminate competition among the mills for the consumer. However, in order for forcing to be found even as probable, the buyer must be forced to buy a product he does not want or would have bought on different terms.

Defendants presented evidence that the Sterling Mill is now the designated mill of defendants and plaintiffs, in

all probability, would have sent their cane to the Sterling Mill notwithstanding the tie, therefore, forcing is not occurring. However, this begs the question as to whether or not the plaintiffs would have preferred the product, i.e., mill services, on *different terms*, i.e., terms they had negotiated and/or agreed to with the mill, their having been free to bargain with the mill and select the mill based upon their own criteria rather than having the mill and all related conditions forced upon them. The jurisprudence defining forcing makes it clear that forcing occurs when the buyer is forced to buy a product he does not want or to buy it elsewhere *on terms he would not otherwise accept*; testimony was clear among the farmers that sending their cane to the Raceland Mill clearly was a product, i.e., milling service of Raceland, they did not want. Testimony was also clear that after Raceland closed accepting the Sterling Mill with no opportunity to evaluate the many criteria involved in the selection of a mill is acceptance of a product on terms they would not otherwise accept. Therefore, clearly forcing did occur.

However, this does not complete this level of the inquiry. A not insubstantial amount of interstate trade must be effected and there must be two separate products for a *per se* violation to exist. It is without question two separate products are being sold. Land is being leased and the service of milling sugar cane is being sold. Therefore, the next inquiry is whether or "not an insubstantial" amount of commerce has been involved. The Supreme Court requires as a threshold matter that there be a substantial potential for economically significant impact on competition in order to justify *per se* condemnation. If only a single purchaser were forced with respect to the

purchase of a tied item the resultant impact on competition would not be sufficient to warrant the concern of the anti-trust law. It is for this reason that the Court has refused to condemn tying agreements unless a *substantial volume of commerce* is foreclosed. In *Fortner, supra,* the Court elaborated that the requirement that "not an insubstantial" amount of commerce be involved makes no reference to the scope of any particular market or to the share of that market foreclosed by the tie . . . "Normally, the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar – volume so as not to be merely *de minimis* is foreclosed to competitors by the tie, for as we said in *International Salt,* it is 'unreasonable *per se* to foreclose competitors from any substantial market' by a tying arrangement." *Fortner, supra* at 501. Testimony shows that the dollar value of dedicated cane milled in the St. Mary/Iberia area was in excess of to 9 million dollars from defendants' sources alone. Therefore, the amount of trade affected clearly is not insubstantial.

The next level of inquiry is whether or not the tying and forcing is economically harmful. Jurisprudence shows tying is economically harmful where power and the market for a *tying product* is used to create *additional power* in the *tied market. Jefferson Parish,* 466 U.S. at 36 (O'Connor, concurring). After the closing of the Oaklawn Mill and the sale of the Raceland Mill, defendants had *no power* in the tied market, i.e., the sugar cane mill market. However, defendants *created power* for themselves in the tied market by interjecting themselves between the land owner and the farmer in the leasing of land and tying the lease of the land to the selection of the mill. Defendants

created extensive power for themselves in a market where heretofore they had none. Even prior to the closing of the Oaklawn Mill and the sale of the Raceland Mill, defendants had created *additional power* for themselves in the tied market by controlling the destiny of substantial amounts of sugar cane which otherwise would have been available for milling by any of the five local mills. Clearly, their power in the *tied market* was increased by their manipulation of the *tying* market, competition was destroyed in the tied market and therefore, the forcing which occurred is economically harmful.

Considering the foregoing, the underlying rationale and spirit embodied in the policy and language of the Sherman Anti-trust Act has been violated by the tying agreements which are before this Court.

Because the concurring opinion in the Supreme Court's most recent pronouncement on this issue, i.e., *Jefferson Parish*, 466 U.S. 2, 32-47, argued strongly that per se condemnation should be closely scrutinized if not done away with altogether, this Court feels that an analysis under Rule of Reason is not inappropriate.

If defendants do not have either the degree or kind of market power that enables them to force a significant number of farmers to take their cane to the selected mill in order to lease land and thereby establish a per se violation, this does not necessarily end the inquiry. An anti-trust violation can nonetheless be established by evidence of an unreasonable restraint on competition in the relevant market, thus requiring a focus on the anti-competitive effects in the market or markets in which the two products are sold. The common core of the adjudicated

unlawful tying arrangement is the *forced purchase of a second distinct commodity with the desired purchase of a dominant tying product, resulting in economic harm to competition in the tied market Jefferson Parish,* 466 U.S. at 18, citing *Times-Picayune.*

The market involved in analysis under Rule of Reason is not necessarily the same market involved under the per se violation. In the per se violation the initial focus is on the market of the *tying product,* in Rule of Reason the primary focus is on the *tying* market and *the anti-competitive effects therein.* Because of the unique nature of the sugar cane industry and the geographic restraints involved and given the relationship between the sugar cane producer and the servicing mill, this Court has found the two relevant geographic markets to be the same. Therefore, an inquiry into the actual effect of the contract on competition in the area in and around the five local mills is needed.

The Supreme Court has condemned tying arrangements when the seller has some "special ability – usually called 'market power' to force a purchaser to do something that he would not do in a competitive market. "When 'forcing' occurs our cases have found the tying arrangement to be unlawful." *Jefferson Parish,* 466 U.S. at 14. However, the Court has drawn a distinction between "the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other . . . if that power is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures. This impairment could either

harm existing competitors or create barriers to entry of new competitors in the market for the tied product and can increase the social costs of market power by facilitating price discrimination, thereby increasing monopoly profits over what they would be absent the tie . . . and from the standpoint of the consumer – whose interest the statute was especially intended to serve – the freedom to select the best bargain in the second market is impaired by his need to purchase the tying product and perhaps by an inability to evaluate the true cost of either product when they are available only as a package." Id. at 14-15.

The concurring opinion in *Jefferson Parish* noted that the Court's prior opinions indicate that the purpose of tying laws has been to identify and control those tie ins that have a *demonstrable exclusionary impact* in the tied product market or that abet the harmful exercise of market power that the seller possesses in the tying products market. According to the Court, under the Rule of Reason, tying agreements should be disapproved only in such instances. The Court explained that tying may be economically harmful or have exclusionary impact in the tied market where power in the market for the *tying product* (i.e., here, land) is used to create *additional market power* in the market for the tied product (i.e., here, the mills). The anti-trust laws are concerned with tying when those positioned as the master lessors are here, threaten to use their market power to acquire additional power in the tied market. However, such extensions of market power are unlikely unless the two markets in question and the nature of the two products tied satisfy three threshold criteria established by the Court:

1. First, the seller must have power in the tying – product market.
2. Second, there must be a substantial threat that the tying seller will acquire market power in the tied product market.
3. There must be a coherent economic basis for treating the tying and tied markets as distinct.

Therefore, where sugar companies, such as the defendants in this case, artificially interject themselves between the land owner and the farmer and use their market power to acquire additional market power in the mills market creating an environment susceptible to driving out competing mills or making it more difficult for new mills to enter the market, an inquiry should be made as to the three factors noted by the concurring Court in *Jefferson Parish* on pages 37-38.

First, the seller must have power in the tying product market. In *Jefferson Parish* the hospital had 30% of all patients and this was found not to be sufficient market power. No matter how one wishes to interpret the land use figures presented in evidence before this Court defendants do not control the requisite 30% of the market. Therefore, one must determine whether or not the product itself, i.e., large contiguous tracts of sugar cane land is in and of itself sufficiently unique so the rationale of *Northern Pacific, supra* can come into play, i.e., minimum market power is required. Here, at issue are large contiguous tracts of sugar cane land which become available for lease generally on a 5-7 year cycle. Large contiguous tracts of sugar cane land are a finite and perhaps unique product in the defined market. The Court in *Jefferson*

Parish in footnote 6 at page 37, cites *Northern Pacific* for the proposition that only a minimal showing of market power is required because of the *unique nature* of the product. However, this does not end the inquiry.

The Court addressed the common misconception that a unique product suffices to demonstrate market power. "While each of these three factors might help to give market power to a seller it is also possible that a seller in these situations will have no market power. *Jefferson Parish, supra* at 37 n. 6 (O'Connor, J., concurring). Therefore, this Court must make an inquiry as to the *market power.*" (emphasis added)

In *Fortner 2, supra* cited in *Jefferson Parish* at page 37, n. 6, the Court conducted a more extensive analysis of whether,

> "The tie was actually an exercise of market power, considering such factors as size and profitability of the firm seeking to impose the tie, the character of the tying product, and the effect of the tie – the price charged for the products, the number of customers affected, the functional relation between the tied and tying products."

There was limited evidence as to the size and profitability of the defendants in this matter; however, it is clear defendants were large enough and profitable enough to enter into the illusory master leases with the land owners and to undercut the farmer in obtaining the land. However, that was done at a time when defendants anticipated being able to recoup the loss by milling the captive cane at their mills. At present, defendants are left with an illusory set of contracts and no apparent manner

by which to recoup their losses but for the tolling agreements.

The tying product, i.e., sugar cane, is unique in character. As noted, the cane is grown by farmers and is sold by farmers to sugar mills. The effect of defendants' actions is to eliminate competition among the mills for farmers and their cane. The farmers have lost completely any negotiating rights and/or leverage they had thereby removing any influence the farmers might have had on what price they are paid by the mills, the efficiency of the mills, the time table for payments; the transportation payment and arrangement and any other competitive criteria. The effect of the tie is to completely destroy competition within the market as to dedicated cane. The farmers no longer have any input in the sale of their crop.

The price charged for the land vis a vis the master lessor and the land owner is illusory – the master lessor undercut the farmer by agreeing to pay a premium price for the land. The farmer cannot compete with the master lessor; to do so would automatically create a loss for the farmer. However, the master lessor by virtue of its size and position can pay the premium price for the land and recoup that cost from either its own mills by milling profit or by entering into tolling agreements with mill owners. Effectively, the mill consumer, the farmer, is completely taken out of the loop. This results in an increase in the cost of cane for the mills which in turn results in an increase in the cost of sugar.

The number of customers affected by the contracts before this Court is limited. However, the *probable number* of consumers affected is substantial as an artificial market

has been created which can be entered by anyone who has the financial capability to "buy in" as land becomes available. To limit the inquiry to only this frozen snapshot of time presented by plaintiffs would be shortsighted. Further, the number of ultimate consumers, i.e., buyers of sugar at an increased cost is arguably quite large. There is a strong functional relationship between the tied and the tying products given the very nature of the products involved.

The collective evaluation of all of the factors considered illustrates an exercise of market power by the defendants. The Supreme Court notes that absent such power tying cannot conceivably have any adverse impact on the tied product market, and can be only pro-competitive in the tying market. This is not the case before this Court. There is substantial adverse impact in the tied product market, i.e., competition for the tied farmer's cane has been eliminated. Therefore, there is no impetus for the mills to compete for the farmers' cane and thereby no impetus for them to be responsive to the needs of those who utilize their services. There is no impetus to become more cost effective and efficient or to be responsive to the power of supply and demand or the effects of competition. There is *no pro-competitive* effect in the tying or the tied product market.

The master lease does not increase competition for land, rather, it creates an *artificial* market wherein parties who have the cash can come and undercut the farmers thereby creating an artificially inflated market. This provides no benefit to the farmer, the ultimate consumer, or if one accepts testimony of Fred Clark, vice-president of Sterling Mills, the mills. There might have been a time the

defendants could have successfully argued the tying arrangement provided some benefit by securing a stable source of cane for their mills; however, that time is past. Even if one were to accept defendants' argument, clearly, this did not work as the Oaklawn Mill closed and the Raceland Mill was sold. Therefore, it is questionable whether or not defendants' argued benefit from the tying agreement ever actually existed; however, this is beside the point. Once the two mills were no longer with defendants, defendants had no basis for the continuation of the tying agreements except to obtain the capital necessary to feed their illusory contracts. No one benefits from this arrangement beyond the land owner, who is receiving an artificially high price for his land, and defendants who are receiving the bounty from their tolling agreement.

Secondly, there must be a substantial threat that the tying seller will acquire market power in the tied product market. The Supreme Court notes that "no such threat exists if the tied product market is occupied by many stable sellers who are not likely to be driven out by the tying, or if entry barriers in the tied product market are low." *Jefferson Parish,* 466 U.S. at 38. The history of the sugar cane milling industry in and around the St. Mary/Iberia area is one of *instability* not stability. The entry barriers in the market are high as entry into the mill market requires tremendous cash outlay at "the front end" on the hope it can be recouped by milling enough cane "on the back end". Sugar cane mills have been going out of business at an alarming rate. One of the major keys to the survival of the sugar cane milling industry is a stable supply of cane. He who has a guaranteed supply of cane will survive and

can expand; he who does not will not. Evidence established sugar mills are very cash intensive at the initial stages of entry and expansion; therefore, sufficient supply of cane must be forthcoming to recoup the initial cash outlay and create a return on the investment. Therefore, he who controls the cane supply controls the entry into the market and profit or loss and survival or death of each of the sugar cane mills in the area. Competition is best served if it is the farmer as producer of the cane and consumer of the mills' services who holds that power. Otherwise, the master lessors can chose [sic] to control the majority of the acreage serviced by the mills, and extract whatever bounty they wish from any one or more of the existing mills and the mill or mills would have to pay the bounty in order to survive. Therefore, new mills could not enter the market without the blessing of those who control the cane nor could existing mills expand without the same blessing. All this would be done based not upon the beneficial effects of competition, but upon the payment of the highest bounty. This new player, by manipulating the artificial market, could completely manipulate and control who could operate in the mill market. The historical instability of the sugar mill industry argues that the mills are not capable of enduring such a practice. If the majority of the sugar cane is tied to existing mills for protracted periods of time, extensive barriers will be created to the entry into the market by new mills or expansion by existing mills. The tying arrangement grants immense power in the tied product market; but, to the tying seller, not the consumer. Consequently, the tie in this matter remains extremely suspect.

Jefferson Parish, supra at 39 citing *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 371 (1965).

Third, there must be a coherent basis for treating the tying and the tied products as distinct. The *Jefferson Parish* Court notes that, "For the products to be treated as distinct, the tied product must, at a minimum, be one that some customers might wish to purchase separately *without also purchasing* the tying product. When the tied product has no use other than in conjunction with the tying product, a seller of the tying product can acquire *no additional* market power by selling the two products together." *Jefferson Parish*, 466 U.S. at 38 (O'Connor, J., concurring). Some customers might wish to purchase mill services without leasing land, i.e., if the farmer owns his land. Consequently, the mill provides services to people who do not lease land, i.e., land owners who farm their own land. Therefore, the tied product, i.e., the mill services, have a use other than in conjunction with the lease of land.

Even though these three conditions are met, under the Rule of Reason a tie in may prove acceptable if it fails the Rule of Reason balance test. Jefferson Parish, supra at 41. "Tie-ins may facilitate new entry into fields where established sellers have wedded their customers to them by ties of habit and custom . . . they may permit clandestine price cutting in products which otherwise would have no price competition at all because of the fear of retaliation from the few other producers dealing in the market. They may protect the reputation of the tying product if failure to use the tied product in conjunction with it may cause it to malfunction . . . And as the tied and tying products are functionally related, they may reduce cost through economies of joint production and distribution." Evidence

presented supports none of these beneficial effects in the tying agreement that is before this Court. As noted, the only potential benefit of this tie agreement *might* have been to create a stable supply of sugar cane to the defendants' mills, i.e., Oaklawn and Raceland, however, for whatever reason defendants chose to close Oaklawn and sell Raceland before the master leases had expired. No benefit to society has been shown; the tying makes the cost of milled cane higher and acts to insulate the mills from the effects of competition. The tie in and its anti-competitive impact outweigh whatever benefit it might create. Therefore, application of these criteria to the case at hand is straight forward; the tie provision must fall.

Therefore, the defendants have market power and can obtain additional market power in the defined geographic area for land. Second, there is clear evidence the defendants have acquired market power over the mills. This market power allows defendants opportunity to drive out existing mills and erect barriers to entry into the market by controlling the one absolutely necessary factor in sugar cane mill operation, i.e., the source of cane. Third, there is a sound economic reason for treating sugar cane land distinct from mill services. And in balance, without the tying agreement the defendants at present have *no* power within the mill market. They control no cane, produce no cane, they own or operate no sugar cane mills. However, with the tie agreements they have created substantial power for themselves in the tied market and destroyed competition. Therefore, the Master leases with tying provisions increases the defendants' power over the mills and confers little, if any, benefit upon the mills, the farmers, or the ultimate consumer.

Therefore, this Court finds the tying agreement as entered into by the defendants is a violation of §1 of the Sherman Act under the Rule of Reason analysis even if not a per se violation of the Act.

DAMAGES

"In the typical tying arrangement, the victim's injury lies in the higher price that must be paid for the tied product as a result of the seller's economic power in the tying product market. Accordingly, the ordinary measure of damages would be the difference between the price actually paid for the tied product and the price at which the product could have been obtained on the open market." *Pogue v. International Industries. Inc.*, 524 F.2d 342, 344 (6th Cir. 1975). To the same effect, *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123 (6th Cir. 1981), *Northern v. McGraw-Edison Co.*, 542 F.2d 1336 (8th Cir. 1976).

These damages reflect, in most cases, at least, the *anti-trust injury* which is a necessary predicate to recovery. This causal requirement was set out in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), where the Court said:

> "Plaintiff must prove *anti-trust* injury, which is to say injury of the type the anti-trust laws were intended to prevent and that flows from that which makes defendant's acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.' " *Brunswick Corp., supra* at 489. [Emphasis in original.]

The plaintiff bears the burden of proving an anti-trust injury which flows from defendants' unlawful acts. See, *Malcolm v. Marathon Oil Co.*, 642 F.2d 845 (5th Cir. 1981).

In this case, as already discussed, the tying product was sugar cane farmland for lease. The defendants made the lease of land a "lever" to force Breaux Brothers to use a designated mill which, Breaux Brothers testified, it would not have used but for the defendants' power in the tying market of farmland. The loss which flows from this unlawful act, and which Breaux Brothers seeks as damages, is the difference in the profit it could have made without the tie and the amount it actually made with the tie.

These are the measure of damages in the typical tying case because, *but for the anti-trust activity, Breaux Brothers would have earned at least the amount of money it made under the tying arrangement.* There is no evidence whatsoever that the tying arrangement sapped Breaux Brothers (or any other plaintiff) of its ability to obtain equipment, supplies, or the cash necessary to run its operations. The only effect of the tying arrangement was to reduce the amount of profits that Breaux Brothers was able to obtain.

The damages claimed by Breaux Brothers are not seriously disputed by defendants, and total, according to adequately supported evidence, $15,189.83. Once injury caused by an antitrust violation is proved, damages need not be shown with mathematical exactitude, *Malcolm*, supra. The Court accepts the claims of Breaux Brothers, and trebles it, per 15 U.S.C. §15. (This section, which grants a private right of action, was enacted as a part or

the Clayton Act in 1890, and applies to *all* private antitrust actions.) The statute also mandates an award of costs and attorneys fees, and, pursuant to the agreement by the parties to defer evidence on this issue until after a ruling on the primary issues, the Court hereby refers this issue to a hearing to be scheduled before the Magistrate, who will make a report and recommendation to the Court. The plaintiff and defendant shall submit their initial evidence on the issue of costs and attorneys fees to the Magistrate within 10 days of this ruling so that a hearing can be scheduled. The parties will thereafter follow a scheduling order issued by the Magistrate. The parties will have an opportunity to review and make objection to the Magistrate's report and recommendation, as per 28 U.S.C. §636.

The injury alleged, and thus the damages sought by Accardo and Teche Planting are far different. Each of these plaintiffs refused to sign the contract which contained the tying arrangement, and each ceased farming the land involved. Accardo later found other land and resumed farming, while Teche Planting has, to date, not resumed its farming operations on acreage equal to the amount lost. Accordingly, both plaintiffs seek to recover all of the profits they would have made had they signed the lease and continued to farm as they had in the past.

The issue, as to these plaintiffs, is whether the damages they seek were *caused* by defendants' unlawful acts. This Court concludes that the defendants have failed to prove that the losses they claim were caused by the tying provision in the lease.

These plaintiffs rely on *Ware v. Trailer Mart, Inc.*, 623 F.2d 1150 (6th Cir. 1980) to support their theory that they may recover damages for leaving business in the face of a contract which contains a tie. However, there are important differences between the Sixth Circuit's decision in *Ware* and this case.

In *Ware*, the plaintiff owned a mobile home and desired to move into a mobile home park owned by defendant. There he was told that he could only rent space if he purchased a mobile home from defendant. Plaintiff refused to lease trailer space from defendant because he already owned a mobile home and did not wish to buy another one. Instead, he leased an apartment, and sought damages in the amount of the apartment lease, as well as the cost of storing his mobile home in which he was unable to live.

The only issue relevant to this case decided in *Ware* was that plaintiff, as a consumer, had standing to bring an anti-trust action. This was the holding of *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), issued the year prior to the court's decision in *Ware*.

Ware, being a "consumer" case, did not involve a claim for the loss of *future profits*, but simply the *direct outlays of cash which were necessitated by defendant's illegal tie*. The Sixth Circuit found Ware had standing to *make his claim* under §4 and . . . to "sue to recover damages for the alleged violations of §1 of the Sherman Act." *Ware* at 1153. This does not give sufficient support to these plaintiffs' claims for *loss* of *all* argued *business profits*, as opposed to *direct cash outlay caused by the illegal tie*. Here, the loss of *all* profits is the result of plaintiffs' *choice* not to

farm at all, not the result of the mill selection. Defendants did not prohibit Accardo and Teche Planting from farming or make it so financially onerous that to farm would have been without profit. Even with the mill selection some profit would have been made if one is guided by the Breaux Brothers' experience. Therefore, it is not reasonable to assess as damages resulting from defendants' actions amounts which could have and would have been earned *even with defendants' actions fully realized.* Rather, the damages *caused* by defendants' action are those Accardo and Teche Planting would have suffered if they *had farmed* with the tie. No evidence to support an award of this amount was presented. Accardo and Teche Planting could have chosen to leave the land and still have maintained their claim for violation of the Act; therefore, they can recover only those damages *caused* by *defendants' actions.*

As illustrated by the many cases in which the plaintiffs *have* successfully recovered lost profits, there must be a *causal connection* between the illegal actions and the loss of business. For example, in *Malcolm,* supra, the plaintiff claimed that the defendant's illegal actions *destroyed his ability* to make a profit and therefore drove him out of business. He did not *choose* to leave the business in which he could have made a profit *even with the illegal tie.*

The causation analysis in *Lehrman v. Gulf Oil Corp.,* 464 F.2d 26 (5th Cir. 1972) is instructive. There, defendant objected to plaintiff's recovery of future profits because this would have allowed the plaintiff, who had been the victim of an anticompetitive practice, to walk away from his business and collect damages, despite the argued

possibility that the business might still be operated successfully. The Fifth Circuit rejected defendant's arguments but grants guidance:

> "When a practice condemned by the Sherman Act *puts a small operator out of business,* we do not think it matters whether the anti-trust violated directly closes down the small proprietor or whether he takes anticompetitive steps which foreseeably will result in the proprietor's demise if carried on for a sufficient amount of time. . . . the facts of the present case give no hint that Lehrman abandoned a successful gas station in the hopes of securing a large judgment in his favor. After 1965 Lehrman struggled along until finally it was clear that the station *was not worth his while." Lehrman v. Gulf Oil Corp.,* 464 F.2d at 45. [Emphasis added.]

The court, in footnote 17, set out Lehrman's declining sales of gasoline from the beginning of the anti-trust activity to the time he ceased business operations. These statistics reveal that the anti-trust activities of the defendants *caused a continual decline* of sales and profits *to the point the business was not worth Lehrman's while to operate.* "On the facts of the present case, there was evidence from which a jury might conclude that Gulf's decision to punish Lehrman by means of its TCA system for his failure to abide by Gulf's system of 'suggested' prices *caused the demise of Lehrman's station." Lehrman* at 45. [Emphasis added.] Here, there was no such evidence presented. By holding that Lehrman need not wait until he became bankrupt before filing an anti-trust action, the court did not eliminate the need for a *causal connection* between the *illegal activity* and the *destruction* of the business.

The contrast between *Lehrman, Malcolm* and this case can be seen in the evidence put forward by Breaux Brothers. Its primary claim is that its profits *were not as great* as they could have been without the tying arrangement, and that the tie deprived it of the opportunity to make greater profits. Neither Breaux Brothers nor any plaintiff suggested this tying arrangement did or would in the future prevent it from conducting successful farming operations; there is no evidence in the record that supports this possibility.

Accardo and Teche Planting failed to prove this essential causal link between the alleged illegal tie and the broad damages they claimed. Had Accardo and Teche Planting continued their lease, farmed and presented evidence of the damage caused them *or* left the land but presented evidence of the amount they would have lost if they had farmed, i.e., but for the tying agreement – they could have supported damages recoverable *as caused* by the illegal tie. However, neither Accardo nor Teche Planting did so.

Two cases which are more factually apt are *Flood v. Kuhn*, 309 F.Supp. 793 (S.D. New York 1970) and *Kapp v. National Football League*, 586 F.2d 644 (9th Cir. 1978). Both cases involve athletes who refused to sign a contract which contained alleged anti-trust violations and sought as damages the money they would have made had they signed the contract and played. In *Flood*, which was before the court as an application for a preliminary injunction, the court found that there was no showing of irreparable harm to the baseball player. Flood's argument was that his career was necessarily brief and that an

injunction was required in order to permit him to continue to play baseball, and make the money which would be available to him only as a baseball player. The Court responded:

> "Plaintiff's argument is compelling, but contains a basic flaw. Plaintiff is not wholly excluded from baseball. He has been offered a contract by the Philadelphia Club for the 1970 season at the same $90,000.00 salary he earned at St. Louis. It is his *choice* not to play baseball. He has a duty to mitigate his damages. Accordingly, we must view his potential injuries not as those which may occur if he chooses not to play baseball, but as those which he will nonetheless suffer if he does play baseball." [italics in the original] *Flood v. Kuhn*, supra at 800.

Kapp involved a suit by a former NFL quarterback who sued the NFL and the team which offered him the "tainted" contract, seeking the amount of that contract, which he had refused to sign. The jury rejected Kapp's claim for damages, finding that his loss of the contract amount was not caused by the defendant's anti-trust violation. The appellate court, upholding the jury's verdict, stressed that Kapp was required to prove that he was injured *"by reason of"* one of the unlawful practices. The court found it significant that Kapp could have signed the contract and reserved his right to challenge the anti-trust rules, but refused to do so.

In this matter, it strikes this Court as significant that these two plaintiffs could have followed the course of Breaux Brothers and farmed under the contract, *while reserving their right to and in fact contesting the offending*

clause. Defendants' designated mill provision did not *prevent* Teche Planting and Accardo *from farming,* nor was evidence presented that the designated mill provision acted or would act to destroy their business of farming. Accardo and Teche Planting were offered a contract by the defendants; they could have farmed and produced revenue under this contract – even with the mill designation. It does not therefore seem to this Court that the entire loss of revenue from their choice not farm at all is owed as damages as having been *caused by* the designation provision. Rather, the damage which could have been caused by *defendants' actions* is the difference between what was or could have been earned by farming the land and taking the cane to the designated mill and what could have been earned by farming and taking the cane to the mill of their choice. This Court was presented with no evidence by Accardo and Teche Planting upon which to make such a finding. There was no reason established by credible evidence why these plaintiffs could not have taken the same course as Breaux Brothers. Accardo and Teche Planting have failed to carry their burden of proof to establish the amount of damages for the defendants' violation.

However, this Court finds that Accardo and Teche Planting, while they have failed to prove the *amount* of damages suffered, have proved both anti-trust injury and the *fact* of damage. Therefore, under the rule enunciated in *Sciambra v. Graham News,* 892 F.2d 411 (5th Cir. 1990), these plaintiffs have established their right to costs and to attorneys fees under 15 U.S.C. §15. Therefore, as with Breaux Brothers, this Court refers the issues of costs and

attorneys fees to the Magistrate for a report and recommendation, as set forth above.

EXPENSES DUE UNDER STATE LAW

Plaintiffs, Teche Planting and Accardo, also seek to recover for expenses incurred in the preservation and upkeep of the land which they had leased from Prudential from the expiration of their lease at the end of 1989 through April 5, 1990 when they left the land. It is not contested that agreement was made to pay "expenses."

Defendants do not dispute Teche Planting's and Accardo's entitlement to expenses, but the parties differ as to the definition of "expenses" and therefore the amount of expenses owed.

Plaintiffs claim, in essence, a proportion of their yearly overhead for the operation of their farm. They assert that these are the "expenses" which defendants promised to pay and which are due. Defendants point to a letter dated April 5, 1990 in which they recited their agreement to pay "actual out-of-pocket" expenses, arguing this evidences their agreement only to pay certain types of expenses which are far less than plaintiffs claim.

It is difficult to determine, upon the evidence presented whether the Court is faced with an ambiguity in terms under a contract or whether the parties' differences are so fundamental that there could not have been a meeting of the minds on this fundamental issue. Whether there is ambiguity, a missing term, or no contract at all, it is appropriate to turn to positive law for guidance. See

La. C.C. Art. 1757 and Art. 2054. It is clear that defendants have agreed to pay some expenses, an obligation already existing under Louisiana law. In the absence of a clear and specific agreement which alters the obligations created under the Louisiana Civil Code, the Court turns to the positive law to find guidance as to the extent of defendant's obligation. See, La. C.C. Art. 2054.

The rights of a lessee to remove improvements and additions made to the land leased is governed, according to La. C.C. Art. 2726, by C.C. Arts. 493, 493.1, 493.2 and 495. See, *Harvey v. Surles,* 228 So.2d 167 (La. App. 1969).

According to these provisions, defendants are obligated to pay, at their option, the current value of the materials and of the workmanship or the enhanced value of the immovable. Defendants have elected to pay the current value of the materials and workmanship, and assert that this is the same as the "out-of-pocket expenses" which they had previously offered to pay. Evidence presented by the plaintiffs argues the plaintiffs desire the current value of the materials and workmanship as well.

Therefore the Court finds that the following expenses are due Accardo:

	Materials
Chemicals	$8,173.05
Fuel	$4,371.61
Insurance	$7,717.24
Utilities	$ 954.65
Pumping expenses	$2,497.00
Subtotal	$23,713.55

	Workmanship
Labor	$38,973.15
Miscellaneous	$ 719.84
Payroll taxes	$3,773.92
Subtotal	$43,466.91
TOTAL	$67,180.46

The Court finds that the following expenses are due Teche Planting:

	Materials
Chemicals	$1,700.00
Fuel	$ 556.83
Insurance	$1,942.70
Repairs	$ 689.86
Supplies	$ 180.80
Subtotal	$ 5,070.19

	Workmanship
Labor	$ 9,890.34
Miscellaneous	$ 26.04
Payroll taxes	$1,285.11
Subtotal	$11,201.49
TOTAL	$16,271.68

For the reasons stated above, this Court grants judgment in favor of plaintiff, Breaux Brothers, Inc. in the amount of $15,189.83, and trebles this amount under 15 U.S.C. §15. The Court finds that although prejudgment interest is now available under this statute, the restricted circumstances in which prejudgment interest is available are not applicable, and prejudgment interest will not be awarded. The Court does grant to Breaux Brothers, Inc.

costs and reasonable attorneys fees. The decision as to the amount of attorneys fees having been deferred by stipulation of the parties, this issue is hereby referred to Magistrate Methvin, who will schedule a hearing and issue a report and recommendation as set forth above.

Further, while this Court finds that Accardo and Teche Planting have failed to prove the *amount* of damages suffered, they have proved both anti-trust injury and the *fact* of damage. Therefore, these plaintiffs have established their right to costs and to attorneys fees under 15 U.S.C. §15 and the Court also refers the issue of attorneys fees to the Magistrate for a report and recommendation, as set forth above.

Finally, this Court finds that Teche Planting is entitled to $16,271.68 in expenses incurred while preserving the land of lessor, Teche Sugar. Accardo is entitled to $67,180.46 in expenses incurred while preserving Teche Sugar's land.

Upon final ruling on the amount of attorneys fees, the parties are directed to prepare and submit a jointly approved judgment to this Court in accordance with this opinion.

Lafayette, Louisiana this 13 day of May, 1992.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE OPE[illegible]USAS DIVISION

BREAUX BROTHERS FARMS, INC.	CONSOLIDATED FILE CV-90-2536
VERSUS	JUDGE REBECCA DOHERTY
TECHE SUGAR COMPANY, INC. AND SOUTH COAST SUGARS, INC.	MAGISTRATE JUDGE PAMELA A. TYNES

JUDGMENT

(Filed Aug. 17, 1992)

This matter came before the Court for trial on February 18, 19, 20, 21, 24, 25, and 26, 1992.

Present in Court for trial were:

Claude F. Reynaud, Jr. and Jude C. Bursavich for the firm of Breazeale, Sachse & Wilson; and Raymond Allain, Sr. for the firm of Allain & Allain, Attorneys for Plaintiffs, Breaux Brothers Farms, Inc.; Teche Planting, Inc.; and Francis "Pat" Accardo; and

Sidney A. Marchand and Vincent Sotile for the firm of Talbot, Sotile, Carmouche, Marchand and Marcello, Attorneys for Defendants, Teche Sugar Company, Inc. and South Coast Sugars, Inc.

Upon consideration of the evidence submitted at trial, the legal memoranda submitted and oral argument of counsel and for written reasons assigned;

IT IS HEREIN ORDERED:

That there be judgment in favor of plaintiff, Breaux Brothers Farms, Inc., and against defendant, Teche Sugar Company, Inc., declaring paragraph 4 of the sublease dated May 2, 1990, between Breaux Brothers Farms, Inc. and the defendant Teche Sugar Company, Inc. illegal and therefore invalid and unenforceable under 15 U.S.C. § 1 of the Sherman Antitrust Act.

Teche Sugar Company, Inc., its agents, assigns or representatives are hereby permanently enjoined from enforcing paragraph 4 of said lease.

That there be judgment in favor of plaintiff, Breaux Brothers Farms, Inc., and against defendants, Teche Sugar Company, Inc. and South Coast Sugars, Inc., pursuant to 15 U.S.C. § 1, for damages in the amount of $15,189.83, and that this amount be trebled pursuant to 15 U.S.C. § 15. The total award therefore is $45,569.49.

That there be judgment in favor of plaintiffs, Teche Planting, Inc. and Francis "Pat" Accardo and against defendants, Teche Sugar Company, Inc. and South Coast Sugars, Inc. pursuant to 15 U.S.C. § 1, in that both plaintiffs proved anti-trust injury.

That there be judgment denying plaintiffs, Teche Planting, Inc. and Francis "Pat" Accardo's prayer for damages under 15 U.S.C. § 1.

That there be judgment in favor of plaintiff, Teche Planting, Inc., and against defendant, Teche Sugar Company, Inc., in the amount of $16,271.68, for expenses

incurred in preservation and upkeep of the land of defendant, Teche Sugar Company, Inc., between January 1, 1990 and April 5, 1990.

That there be judgment in favor of plaintiff, Francis "Pat" Accardo, and against defendant, Teche Sugar Company, Inc., in the amount of $67,180.46, for expenses incurred in preservation and upkeep of the land of defendant, Teche Sugar Company, Inc. between January 1, 1990 and April 5, 1990.

That there be judgment in favor of plaintiffs, Breaux Brothers Farms, Inc., Teche Planting, Inc. and Francis "Pat" Accardo, and against defendants, Teche Sugar Company, Inc. and South Coast Sugars, Inc. for reasonable attorneys' fees and costs pursuant to 15 U.S.C. § 15, in the amount of $184,747.00 and for all court costs.

Judgment rendered for written reasons assigned on the 17 day of August, 1992.

Lafayette, Louisiana this 17 day of August, 1992.

/s/ Rebecca F. Doherty
JUDGE, UNITED STATES
DISTRICT COURT,
WESTERN DISTRICT OF
LOUISIANA

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4968

BREAUX BROTHERS FARMS, INC.,

Plaintiff-Appellee,

TECHE PLANTING CO., INC. and
FRANCIS PAT ACCARDO,

Plaintiffs-Appellees,
Cross-Appellants,

versus

TECHE SUGAR CO., INC.,
SOUTH COAST SUGARS, INC.,

Defendants-Appellants,
Cross-Appellees.

****

TECHE PLANTING CO., INC.,
FRANCIS PAT ACCARDO,

Plaintiffs-Appellees,
Cross-Appellants,

versus

TECHE SUGAR CO., INC.,
SOUTH COAST SUGARS, INC.,

Defendants-Appellants,
Cross-Appellees.

Appeals from the United States District Court
for the Western District of Louisiana

(Filed June 10, 1994)

(6:90-CV-2536)

Before WISDOM, HIGGINBOTHAM, and JONES, Circuit Judges.

ON PETITION FOR REHEARING

PER CURIAM:*

Breaux Brothers Farms, Teche Planting, and Francis Pat Accardo sought relief from an alleged tying arrangement instituted by Teche Sugar and South Coast Sugars. Breaux Brothers entered the arrangement, and Teche Planting and Accardo refused to do so. We found the tying arrangement, if one existed, not to violate antitrust law. We deny rehearing for the reasons stated in our opinion.[1]

Teche Planting and Accardo also seek augmentation of the amounts awarded to them by the district court for work performed before negotiations over renting the land failed. The district court found ambiguous the agreement

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] *Breaux Brothers Farms v. Teche Sugar Co.*, No. 92-4968 (May 4, 1994).

that Teche Sugar would compensate Teche Planting and Accardo for the expenses they incurred during lease negotiations. The court appropriately appealed to the Civil Code for guidance in resolving the ambiguity.[2] The court compared the agreement to one between an owner of land and a lessee who improves the land, the legal relationship which most closely resembled Teche Sugar's arrangement with Teche Planting and Accardo.[3] To determine the value of the expenses allowed according to this approach, the courtappropriately did not include overhead expenses and profit.[4]

Teche Planting and Accardo claim that the district court mistook Teche Sugar for the owner of land when in fact Teche Sugar merely let the land. The court did not, however, make this error. The court merely employed the relationship between land owner as lessor and farmer as lessee as an instructive analogy. The court acted appropriately in doing so.

Teche Planting and Accardo also request reimbursement for costs that the court disallowed. The court estimated the work and material that Teche Planting and Accardo provided in anticipation of the lease and from which they would not benefit. The repairs improved the equipment that Teche Planting and Accardo took with them when they left the farmland. Moreover, the district court's disallowance of the cost of renting equipment finds adequate support in the possibility that the farmers

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[2] *See* La. Civ. Code Art. 2054.

[3] *See* La. Civ. Code Art. 2726.

[4] Cross-appellants acknowledge as much.

would have possessed the equipment regardless of the expectation of a lease.

We find the legal basis of the court's award sound, and conclude that the court did not make any clearly erroneous factual findings in refusing to require Teche Sugar to reimburse Teche Planting and Accardo for repair work from which they would later benefit or by disallowing rental expenses. The district court award stands in regard to the amount owed Teche Planting and Accardo.

Petition for panel rehearing is denied.

Supreme Court, U.S.
FILED
OCT 12 1994
OFFICE OF THE CLERK

No. 94-437

In The

Supreme Court of the United States

October Term, 1994

BREAUX BROTHERS FARMS, INC., TECHE PLANTING, INC. and FRANCIS "PAT" ACCARDO,

Petitioners,

versus

TECHE SUGAR COMPANY and SOUTH COAST SUGARS, INC.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit properly applied the standards of *Jefferson Parish Hospital District No. 2 v. Hyde* and concluded that, if characterized as a tying arrangement, the proposed contract challenged by Petitioners had no antitrust significance.

2. Whether the proposed contract of which Petitioners complained would properly be characterized as a tying arrangement.

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No. 94-437

In The

Supreme Court of the United States

October Term, 1994

BREAUX BROTHERS FARMS, INC., TECHE PLANTING, INC. and FRANCIS "PAT" ACCARDO,

Petitioners,

versus

TECHE SUGAR COMPANY and SOUTH COAST SUGARS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents Teche Sugar Company and South Coast Sugars, Inc. (referred to jointly as "South Coast")[1] owned two sugar mills in south Louisiana. South Coast faced stiff competition from other mills, particularly local cooperatives which had long-term contracts with their farmer

[1] Each of the Respondents is owned by South Louisiana Sugars, Inc., which is a wholly owned subsidiary of South Coast Investment Company. Neither of the Respondents has any non-wholly owned subsidiaries.

members. In order to ensure a supply of cane for their mills, Respondents leased a portion of the Oaklawn Plantation where cane was grown. Respondents offered to sublease the land to Petitioners Breaux Brothers Farms, Inc., Teche Planting, Inc., and Francis "Pat" Accardo. Petitioners had previously leased portions of the Oaklawn Plantation themselves, and were offered the subleases when their original leases expired.

The Agricultural Agreement and Sublease South Coast proposed to Petitioners contained a "mill designation clause" pursuant to which South Coast, as one of the owners of the sugar cane crop to be produced on the property, was given the sole right to determine the mill to which the sugar cane crop would be sent for processing. Breaux Brothers elected to sign the Agricultural Agreement and Sublease; Teche Planting and Accardo did not.

Petitioners initially filed suit in Louisiana state court, alleging that the Agricultural Agreement and Sublease violated the Louisiana antitrust laws. Their claims were rejected by the state court and the suit was dismissed.

Petitioners then filed suit in the United States District Court for the Western District of Louisiana, again complaining that the contract for growing sugar cane on the Oaklawn Plantation constituted a "tying agreement" which violated the Sherman Act.[2] The lawsuit was financed by a farmers' group known as the St. Mary Growers Association. After a bench trial, the district

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[2] The suit also asserted certain claims arising under state law with respect to the termination of the prior lease. Those claims are not in issue before this Court.

court found in favor of Petitioners, awarding them $45,569.49 in antitrust damages and $184,747.00 in attorneys' fees. *Breaux Brothers Farms, Inc. v. Teche Sugar Co.*, 792 F. Supp. 1436, 1459 (W.D. La. 1992). South Coast perfected an appeal to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit held that South Coast was entitled to judgment as a matter of law. The record revealed that even in the most narrowly drawn geographic market – St. Mary's Parish, Louisiana – South Coast controlled only 17.5% of the sugar cane farmland. Expanding the market to include a part of Iberia Parish left South Coast with only 9.4% of the market. Assuming without deciding that the contract was a tying arrangement, the Fifth Circuit held that South Coast's insignificant share of the market for the alleged tying product (sugar cane farmland) meant that as a matter of law there was no *per se* violation of the Sherman Act. Although under the analysis suggested by many courts the absence of such market power would also preclude a finding that the contract was an unreasonable restraint of trade, the Fifth Circuit went on to review the record carefully and determine that there was no evidence of an adverse impact on competition in the market for the tied product (mill grinding services). Accordingly, the court concluded that South Coast was entitled to judgment as a matter of law on Petitioners' tying claim and reversed the judgment of the trial court. *Breaux Brothers, Inc. v. Teche Sugar Co.*, 21 F.3d 83, 89 (5th Cir. 1994).

REASONS FOR DENYING THE WRIT

The petition for writ of certiorari should be denied. This Court's decision in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), clearly established the criteria upon which a tying case is to be analyzed. The Fifth Circuit decided this case using those criteria. The pre-*Jefferson Parish* cases Petitioners cite do not present an unresolved split in circuit court authority.

Under the *Jefferson Parish* standards, a party with a 9-17% market share cannot be guilty of a *per se* violation of the Sherman Act in a tying case. Four members of this Court concluded in *Jefferson Parish* that the fact of low market share alone ends the inquiry into a tying violation (and several circuit courts have subsequently so held). The majority in *Jefferson Parish* analyzed the record for any evidence that the tie adversely impacted competition in the market for the tied product.

Following *Jefferson Parish* in this case, the Fifth Circuit concluded that there was no *per se* violation of the Sherman Act because of South Coast's low market share. The court then examined the record for evidence of an adverse impact on competition in the market for the tied product; there was none. Thus it found, also in accordance with *Jefferson Parish*, that there was no violation of the Sherman Act.[3]

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[3] The Fifth Circuit found it unnecessary to address the issue of whether the Agricultural Agreement and Sublease actually constituted a "tying arrangement" and the fact that there was no evidence in the record of any impact on interstate commerce. These are, however, independent bases upon which the Fifth Circuit's decision correctly decided this case.

I.

THE APPLICATION SHOULD BE DENIED BECAUSE THE FIFTH CIRCUIT PROPERLY APPLIED THE STANDARDS OF *JEFFERSON PARISH* AND CONCLUDED THAT, IF CHARACTERIZED AS A TYING ARRANGEMENT, THE TRANSACTION QUESTIONED BY PETITIONERS HAD NO ANTITRUST SIGNIFICANCE AS A MATTER OF LAW

The Fifth Circuit opinion reflects that it carefully analyzed the record presented to the trial court and properly applied the standards this Court has articulated.

A. There Could Be No *Per Se* Violation Of The Sherman Act Under The Trial Court's Findings.

The Fifth Circuit accepted the trial court's constricted definition of the relevant geographic market,[4] and its finding that ownership of two farms in that market accounted for "between a nine and seventeen percent" share of the relevant market for sugar cane land.[5] Applying the standards of *Jefferson Parish*, the court then easily

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[4] The trial court found that the "relevant geographic market" was governed by the location of the Oaklawn Plantation and consisted of a circle with a twenty-five mile radius around that farm. Under this definition, of course, there could not be two farms that were in the identical relevant geographic market.

[5] In addition to the Oaklawn Plantation, one of South Coast's sister corporations owned a farm in south Louisiana. The Fifth Circuit also noted that what was properly characterized as sugar cane land was, of course, a direct function of the profitability of sugar cane farming. When the profitability of sugar cane farming increased, more land became "available" for sugar cane.

concluded that there could be no substantial market power in the market for the alleged tying product (sugar cane land) as a matter of law.

In *Jefferson Parish*, this Court held that a 30% share of the market for the tying product was insufficient, as a matter of law, to provide a predicate for a *per se* violation of the Sherman Act. So here the Fifth Circuit concluded that South Coast did not possess substantial market power in the market for the tying product and, as a matter of law, there could be no *per se* violation of the Sherman Act.

B. There Was No Record Evidence To Support A Conclusion Of An Unreasonable Restraint Of Trade.

Having concluded that there was no *per se* violation of the Sherman Act, the Fifth Circuit turned to the trial court's conclusion that the record evidence supported a determination that there had been an unreasonable restraint of trade. While the Fifth Circuit carefully examined the record and concluded that there was no evidence to support such a finding, arguably this record analysis was not even necessary.

(i) In The Absence Of Substantial Market Power In the Market For the Tying Product, There is No Basis For Finding An Unreasonable Restraint Of Trade.

Justice O'Connor's concurring opinion for four members of this Court in *Jefferson Parish* concludes that the

absence of substantial market power in the market for the tying product is the end of the inquiry in any attack on a tying arrangement. Since the concern with tying is only with respect to the unwarranted extension of substantial market power from one market to another, the concurring opinion reasoned that in the absence of substantial market power in the market for the tying product, the antitrust laws have no concern with a tying arrangement. Noted commentators and several courts agree.[6] This Court's more recent decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S. Ct. 2072, 2080 (1992), does not address this question, but it does characterize appreciable economic power in the tying market as a "necessary feature" of any illegal tying arrangement.

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[6] *See Jack Walters & Sons v. Morton Building, Inc.*, 737 F.2d 698, 702 (7th Cir.) ("This means among other things that the plaintiff must show that the defendant has market power . . . , as this is a prerequisite to being able to restrain trade unreasonably. . . . *[Jefferson Parish]* requires the plaintiff to make a similar, maybe identical showing in order to prove that a tying arrangement is unlawful, even though tying is still referred to as a *per se* offense."), *cert. denied*, 469 U.S. 1018 (1984). The Seventh Circuit subsequently held that in the absence of a showing of market power in the market for the tying product a defendant is entitled to summary judgment on a tying claim. *Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532, 537-38 (7th Cir. 1986). The Eleventh Circuit agrees. *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1503 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986). Evidently, so does the Sixth Circuit. *Hand v. Central Transport Inc.*, 779 F.2d 8, 11 (6th Cir. 1985) (per curiam) ("A defendant must have market power before its conduct can be shown to have an adverse effect on competition."). *See also* Kevin J. Arquit, *Market Power in Vertical Cases*, 60 ABA Antitrust L.J. 921, 932 (1992).

(ii) There Was No Evidence That South Coast Had Any Power To Raise Prices In The Market For The Tied Product Nor Evidence Of Any Other Adverse Impact On Competition.

The majority opinion in *Jefferson Parish*, however, found it unnecessary to reach the question whether, in the absence of substantial power in the market for the tying product, there can be an unreasonable restraint of trade. The majority opinion concluded that the record should be analyzed to determine if, in the absence of substantial power in the market for the tying product, the tie had any adverse impact on competition in the market for the tied product. 466 U.S. at 31.

Following the direction of the *Jefferson Parish* majority, the Fifth Circuit in this case analyzed the trial court's finding that the restraint was "unreasonable" by focusing directly on the market for the allegedly tied product (milling services). There, the record indicated that vigorous competition was present. Indeed, the genesis of the transaction in issue here was an effort on the part of South Coast to compete with two local cooperatives owned by farmers groups which required the members of the co-op to mill their sugar cane at the cooperative mill or pay substantial penalties to the co-op for not doing so. In an effort to meet this competitive threat, South Coast had taken additional economic risks (by providing the landowner with a guaranteed return on his investment)

in order to obtain sugar cane for use at its mills.[7] There was no evidence that South Coast had any power to raise prices or otherwise adversely impact competition in any sugar cane milling market. Indeed, vigorous competition in the market for sugar cane milling services continued.

Petitioners' arguments to the courts below were, and its petition here is, an emotional appeal based on the assumption that the farmers had an absolute right to lease the land they wanted on exactly the terms they wanted, and that, in any event, they should have an absolute right to determine where the sugar cane grown on South Coast's land was milled. Since they did not get

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[7] The lack of antitrust significance in this particular case was highlighted by the fact that this Court's essential concern with tying arrangements has consistently been that a party not use significant market power that it enjoys in the market for the tying product to unfairly extend that power into the market for the tied product. *E.g., Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S. Ct. 2072, 2080 (1992) ("Having found sufficient evidence of a tying arrangement, we consider the other necessary feature of an illegal tying arrangement: appreciable economic power in the tying market."). Yet here it was uncontroverted that South Coast had acquired the land in question in order to promote the business of its sugar cane mills, which were facing stiff competition from other mills, particularly local cooperatives which had entered into long-term contracts that guaranteed them a source of cane for their mills. In other words, far from leveraging a strong market position in the tying product to acquire power in the tied market, South Coast had first acquired land in the tying market in an effort to compete in the tied market. This is the opposite situation from that with which this Court has expressed concern; i.e., one in which the defendant already enjoys "substantial market power" in the market for the tying product and attempts to use that power to disrupt competition in the market for the tied product.

exactly what they demanded, they claimed "competition" was injured. The fallacy in this argument, of course, is that the agreement only allocates the selection of the mill to South Coast. It does not eliminate any buyer from the market for mill services; it merely designates which of the two crop owners will make the selection. There was no evidence that even suggested that this allocation had any impact on prices in the market for milling services.

C. The Decisions Cited By Petitioners Do Not Establish That This Case Presents Questions Of Law Not Resolved By This Court.

In their attack on the Fifth Circuit's opinion, Petitioners cite several pre-*Jefferson Parish* circuit court opinions and earlier opinions of this Court and claim that the Fifth Circuit decision in this case is inconsistent with those decisions. These arguments were presented to the Fifth Circuit and rejected. The Fifth Circuit's opinion correctly distinguished these cited cases on their facts. 21 F.3d at 87-88; Pet. App. at 8-11. Moreover, this Court's decision in *Jefferson Parish* resolved questions left open by earlier decisions about what constitutes sufficient market power in the market for the tying product for *per se* analysis.

For example, *Northern Pacific Railway v. United States*, 356 U.S. 1 (1957), involved a tying claim predicated on the railroad's control of forty million acres of western land. This Court's decision does not reveal what market characteristics of those vast tracts of land located in "checker board fashion" gave the railroad sufficient market power to provide the predicate for a *per se* violation.

Whether or not Northern Pacific's share of the market for the tying product would have been sufficient to meet the standards later prescribed in *Jefferson Parish*, it is clear from the opinion that the mere fact that land was involved in that case does not mean that the owner of every farm who wants to contract with someone to farm the land for a share of the crop enjoys "substantial market power" in the market for farmland as Petitioners urge, or that markets involving "land" are to be analyzed differently than other markets. As this Court later noted, *Northern Pacific* should not be read to make proof of market power irrelevant. *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 620 n.13 (1977). Petitioners' argument here is that it should.[8]

The Fifth Circuit also correctly distinguished the pre-*Jefferson Parish* cases upon which Petitioners rely in an attempt to find a split in circuit opinion. In *Ware v. Trailer Mart, Inc.*, 623 F.2d 1150 (6th Cir. 1980), the issue of how much market power the defendant had to possess for a *per se* tying violation was not even addressed. In *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123 (6th Cir. 1981), the defendant was found to have sufficient power in the market for airport space, the tying market, for a *per se* violation because it was a dominant firm in a uniquely advantageous position. By contrast, there was no showing in this case that South Coast held a dominant position

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[8] Indeed, the trial court appeared to reject this argument. 792 F. Supp. at 1445; Pet. App. at 33-34. *See also Baxley-DeLamar Monuments, Inc. v. American Cemetery Ass'n*, 938 F.2d 846, 851 (8th Cir. 1991) ("the mere fact that the tying product is real estate does not convey market power").

in the sugar cane land market or that its land conferred a market advantage not possessed by its competitors.

The other cases Petitioners cite are similarly distinguishable. *See Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n*, 666 F.2d 1130 (8th Cir. 1981) (defendants not only tied the purchase of one good to another, but conspired to adopt a uniform tying arrangement in the industry as well), *cert. denied*, 457 U.S. 1111 (1982); *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207 (9th Cir. 1977) (defendant controlled 78% of the tying product).

Indeed, the notion that South Coast's control of two farms in two south Louisiana parishes established its substantial market power is based on nothing more than Petitioners' intransigent insistence that they were entitled to lease Respondents' land on the terms they wanted and since they were unable to do so South Coast had substantial market power. There is no authority for that proposition. The Fifth Circuit's conclusion that this record does not support a finding of an unreasonable restraint of trade is clearly correct.

II.

IN ANY EVENT, THE BUSINESS TRANSACTION AT ISSUE IN THIS CASE WAS NOT PROPERLY CHARACTERIZED AS A TYING ARRANGEMENT AND HAD NO ANTITRUST SIGNIFICANCE

The Fifth Circuit's opinion held that it was unnecessary to decide whether there were actually two products involved here that could be subject to a tie since, reasoned the Court, "assuming that they do . . . , [Petitioners] have nevertheless failed to establish that the

lease violated the Sherman Act." 21 F.3d at 85-86; Pet. App. at 4-5. Fundamentally, however, the business transaction in question here was not a tying arrangement at all.

South Coast was, of course, free to farm Oaklawn Plantation itself and send the cane to be milled where it wished. Its decision to do that would have had no antitrust significance. Likewise, South Coast was free to employ someone to perform farming services pursuant to its direction, and that arrangement would have raised no antitrust concerns. On the other hand, if South Coast sold its interest in the land and required as a condition of the sale that sugar cane be grown on the land and that the sugar cane be milled at its mills, the arrangement would call for antitrust analysis. The transaction at issue here was much more analogous to the former than to the latter.

The contract offered to Petitioners, captioned "Agricultural Agreement and Sublease," contemplated that each Petitioner would provide capital and labor and in return receive an 80% share of the crop. For providing the land, South Coast would receive a 20% share of the crop. The contract provided exactly what the farmer was to do with the land, i.e., grow sugar cane, and how the sugar cane was to be divided between the two parties. The contract reserved to one of the joint owners of the cane the right to designate the mill at which it would be processed. As South Coast urged to the trial court and again to the Fifth Circuit, such a contractual right between two co-owners of a product allocating responsibility for its handling to one of them is not a "tying arrangement." The relief Petitioners sought was simply

that they – rather than South Coast – should be allowed to designate where the jointly owned cane would be milled. There is no substantive difference between giving Petitioners, as opposed to South Coast, this right. Of course, Petitioners would not say that the allocation of this right to them would be a "tying arrangement." Neither is it a tying arrangement when the right is allocated to the other producer and co-owner of the cane – South Coast.

Petitioners' tying claim is predicated on the fact that the document giving them their rights is characterized as a "lease" of the land. Perhaps for purposes of insurance and other business operating expenses it is desirable to characterize the document as a lease, but the economic reality is that it is a sharecropping agreement. If the document had the words "Sharecropping Agreement" at the top and omitted a property description, there would be no change in the economic substance of the arrangement South Coast offered to Petitioners, but it would not have the patina of the tying claim Petitioners have pursued.

In other contexts, this Court has looked to the economic substance of the transaction involved, not how the parties characterized it. For example, in *United States v. Sealy, Inc.*, 388 U.S. 350, 352-53 (1967), the parties characterized their contractual arrangement as a vertical grant of a trademark license. Looking to the joint ownership of the grantor by the grantees, however, this Court held that the transaction should be viewed as a horizontal agreement among competitors. This Court explained, "We seek the central substance of the situation, not its periphery; and in this pursuit, we are moved by the identity of the persons who act rather than the label of their hats." The circuit

courts have subsequently analyzed other transactions by their central substance, rather than what the parties call them, when determining whether transactions raise any antitrust concerns. *See, e.g., Hardwick v. Nu-Way Oil Co.*, 589 F.2d 806 (5th Cir.) (gasoline distributor's contract with its consignee not to be analyzed as a consignment agreement where, under the facts of the case, the consignee was clearly an employee of the defendant; therefore, the agreement was of no antitrust significance), *cert. denied*, 444 U.S. 836 (1979); *Souza v. Estate of Bishop*, 821 F.2d 1332, 1336 (9th Cir. 1987) (requirement that lessee also lease a house in order to obtain the land on which the house was situated not a tie, since the substance of the transaction was the lease of only one property despite the provisions of the contract referring to them individually); *McGee v. First Fed. Sav. & Loan Ass'n*, 761 F.2d 647, 648 (11th Cir.) (lender's requirement that borrower purchase an appraisal from a designated appraiser in order to obtain a loan not a tie of the appraisal to the loan because both the lender and the borrower had an interest in the value of the security), *cert. denied*, 474 U.S. 905 (1985).[9]

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[9] Moreover, several cases hold that a bundling of goods when the seller has an interest in product quality does not amount to a tying agreement of interest under the antitrust laws. *See, e.g., Smith v. Mobil Oil Corp.*, 667 F. Supp. 1314 (W.D. Mo. 1987) (holding that the Mobil trademark and Mobil gas were the same product – Mobil-branded gasoline); *Principe v. McDonald's Corp.*, 631 F.2d 303 (4th Cir. 1980) (holding that a lease, franchise agreement, and security deposit were all parts of one product – the franchise), *cert. denied*, 451 U.S. 970 (1981); *KFC Corp. v. Marion-Kay Co.*, 620 F. Supp. 1160, 1166 (S.D. Ind. 1985) (holding that the KFC trademark and the KFC seasoning were not separate products).

Here, the substance of the transaction was a share-cropping arrangement between Petitioners and South Coast. Between the two, it was necessary that one be allocated the right to choose a mill to process their jointly owned product. This contractual allocation of a right to choose a mill for processing the jointly owned cane presents no threat to competition. The implication of declaring that it does is that any other contract permitting one of several joint owners to select goods or services pertaining to the joint enterprise would have to be analyzed as a tying arrangement. To do so makes no more economic sense than to declare that a pencil constitutes a tying of the sale of lead to an eraser. In substance, this case presented no issue of antitrust significance and the motion to dismiss the plaintiffs' claims on that basis should have been granted by the trial court in the first instance.

CONCLUSION

Under the facts as found by the trial court, Petitioners were not entitled to the legal relief they were awarded by the district court. The allegations and the evidence were carefully analyzed by the Fifth Circuit and properly resolved under this Court's precedent. There is

no issue in this case that warrants review of the Fifth Circuit decision by this Court.

Respectfully submitted,

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